IN THE

Supreme Court of the United States

October Term, 1979
No. 78-1487

FORD MOTOR CREDIT COMPANY, *et al.*,
Petitioners,

vs.

DENNIS MILHOLLIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONERS

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Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 588 F.2d 753 and is reproduced in the Joint Appendix at pages 42 to 54.[1] The opinions, orders and judgments of the United States District Court for the District of Oregon are not reported and are reproduced in the Joint Appendix at pages 26 to 41 and 69 to 74.

[1]The Joint Appendix will be referred to herein as "J.A." The Appendix to the Brief will be referred to as "App." The Record on Appeal will be referred to herein as "R.A."

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 28, 1978. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was filed on March 27, 1979 and was granted on June 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

Statutory Provisions and Regulations Involved

Truth in Lending Act § 128(a)(9), 15 U.S.C. § 1638(a)(9) (1976):

> "(a) In connection with each consumer credit sale not under an open end credit plan, the creditor shall disclose each of the following items which is applicable:
>
> . . . .
>
> (9) The default, delinquency, or similar charges payable in the event of late payments."

Regulation Z, 12 C.F.R. § 226.8(b)(4) (1978):

> "(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> . . . .
>
> (4) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments."

Regulation Z, 12 C.F.R. § 226.8(b)(7) (1978):

> "(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> . . . .

> (7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed."

Questions Presented

These cases arise under Title I of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601 *et seq.* (1976), popularly known as the "Truth in Lending Act" (herein "the Act"),[2] and Regulation Z, 12 C.F.R. § 226 (1978) (herein "the Regulation"), promulgated by the Federal Reserve Board to implement the Act.

In any consumer credit transaction subject to the Act, the Act and the Regulation require the creditor to disclose to the consumer, prior to the extension of credit, certain information regarding the terms of the proposed transaction. The issues involved in these cases relate to whether any disclosures are required under the Act or the Regulation by reason of the existence in a consumer credit contract of an acceleration clause which permits the creditor to declare all unpaid installments to be immediately due and payable

[2] A Legislative History of the Act is attached to this Brief as Appendix A.

in the event of a default by the consumer. The questions presented are:

1. Whether the existence of an acceleration clause in a consumer credit contract must be disclosed under Section 128(a)(9) of the Act or Section 226.8(b)(4) of the Regulation as a default, delinquency or similar charge payable in the event of late payments.

2. Whether default, delinquency or similar charge disclosures are required with respect to an acceleration clause under Section 128(a)(9) of the Act or Section 226.8(b)(4) of the Regulation if the creditor rebates unearned finance charges upon payment of the indebtedness after acceleration in the same manner that it rebates unearned finance charges upon prepayment of the indebtedness where there has been no acceleration.

3. Whether a creditor's acceleration of a consumer credit indebtedness upon default is itself a "prepayment" of the indebtedness within the meaning of Section 226.8(b)(7) of the Regulation.

4. Whether the creditor's method of rebating unearned finance charges upon payment of an indebtedness after acceleration must be separately disclosed under Section 226.8(b)(7) of the Regulation where the creditor's rebate disclosure applicable to prepayment applies to payment in full both before and after acceleration.

5. What judicial deference and effect should be given to both official and unofficial Federal Reserve Board Staff Interpretations of the foregoing Sections of the Act and the Regulation that deal specifically with all of the foregoing questions.

Statement of the Case

These cases began with two separate actions, one brought by Respondents Dennis and Michelle Milhollin (herein "the Milhollins") and the other by Respondent Donna M. Eaton (herein "Eaton"), in the United States District Court for the District of Oregon. The actions were brought against two automobile dealers and Ford Motor Credit Company (herein "Ford Credit"). Jurisdiction was based upon Section 130(e) of the Act, 15 U.S.C. § 1640(e) (1976). [J.A. 3, 56] The factual and legal issues presented by the two cases are in most respects identical.

Both the Milhollins and Eaton (herein "the Buyers") purchased an automobile from a dealer. As a part of each transaction, the Buyers paid the dealer a downpayment and signed an installment sale contract in favor of the dealer for the balance of the purchase price. The contracts included finance charges that were precomputed on the assumption that all payments would be made as scheduled. The precomputed finance charges, together with certain other charges, were added to the unpaid balance of the cash price to form the total precomputed contract balance. The Buyers were obligated to pay the balance in monthly installments over a specified period of time. In both cases, the contracts were subsequently assigned by the dealers to Ford Credit. [J.A. 4, 11-12, 57, 62]

The installment sale contracts signed by the Buyers consisted of single-page printed forms that were pre-

pared specifically for use in connection with installment sales of automobiles subject to the Act. [J.A. 9-10, 65-66] The terms and conditions of the sale were contained on both sides of the page. Consistent with Section 226.8(a) of the Regulation, 12 C.F.R. § 226.8(a) (1978), which requires all truth in lending disclosures to be made on the same side of a single page, the front side of the contract also served as the "disclosure statement" required under the Act. In both cases, the same form of contract was used. [J.A. 9-10, 65-66]

Paragraph 14 on the front side of the contract contains the following provision dealing with the buyer's right to a rebate of unearned finance charges in the event of a prepayment of the obligation:

> "(14) Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00." [J.A. 9, 65]

This provision applies to prepayment of the indebtedness in full and does not differentiate between a prepayment that occurs after an acceleration of the installment due dates and a prepayment that occurs where there has been no such acceleration. This provision is in compliance with Oregon state law, which requires the holder of the contract to rebate unearned finance charges upon prepayment of the contract indebtedness regardless of whether the prepayment occurs before

or after an acceleration of the installment due dates.[3] Ford Credit's practice in all cases is to rebate unearned finance charges upon prepayment of the indebtedness after an acceleration in the same manner that it rebates unearned finance charges upon prepayment where there has been no acceleration. [J.A. 22, 68][4]

Paragraph 12 on the front side of the contract discloses default and delinquency charges as follows:

> "(12) Delinquency Charges: Buyer hereby agrees to pay a delinquency charge on each instalment in default for more than 10 days in the amount of 5% thereof or $5.00, whichever is less, plus such expenses incurred by Seller in effect-

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[3]The Oregon motor vehicle financing statute requires a rebate of unearned finance charges if the debtor prepays a retail installment contract in full after acceleration. Section 83.620(1) of the Oregon Revised Statutes provides:

> "Notwithstanding the provisions of a retail instalment contract to the contrary, the buyer may pay in full at any time before maturity the obligation contained in the retail instalment contract. Upon such premature prepayment, the buyer shall receive a refund credit." O.R.S. § 83.620(1) (Or. L. 1977).

The caption to this section refers to "Voluntary prepayment by buyer; refund." However, the caption was not a part of the legislative enactment, but was added by the legislative counsel who compiles the statutes for publication. *See* Or. L. 1977, ch. 692, § 1; Or. L. 1957, ch. 625, § 24. Under Oregon law, the caption added by the compiler of the statutes "does not constitute any part of the law." O.R.S. § 174.540 (1977-1978).

[4]In *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978), a case involving a similar Ford Credit form of contract and Ford Credit's identical policy with respect to rebating unearned finance charges upon payment following acceleration, the Eighth Circuit noted: "It is undisputed that the creditor's policy in this case is to rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement." 577 F.2d at 460 n.6.

ing collection hereunder as may be allowed by law." [J.A. 9, 65]

Paragraph 19 on the reverse side of the contract sets forth the rights and remedies of the holder of the contract upon the buyer's default, such as: the right to accelerate the due date of all unpaid installments; the right to repossess the motor vehicle; the right to pursue remedies under the Uniform Commercial Code; the right to sell the motor vehicle at public or private sale; and the right to recover a deficiency judgment. [J.A. 10, 66] The acceleration remedy is set forth in the following terms:

> "In the event Buyer defaults in any payment, . . . or fails to comply with any other provisions hereof . . ., Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable. . . ." [J.A. 10, 66]

These contractual remedies upon default are not separately disclosed on the front side of the contract.

The Buyers fell behind in the payment of the contract installments. Ultimately, Ford Credit repossessed the motor vehicles. In the *Milhollin* case, the motor vehicle was resold after repossession. [J.A. 16-17, 27] In the *Eaton* case, the motor vehicle was retained by Ford Credit in full satisfaction of the unpaid indebtedness pursuant to Oregon law. O.R.S. § 79.5050 (1977-1978) [R.A. 70]

The Buyers then filed suit against the dealers and Ford Credit alleging violations of the Act and the Regulation and seeking statutory damages, attorney's fees and costs of suit. [J.A. 6-7, 59] In both cases, the dealers and Ford Credit were alleged to have violated

the Act and the Regulation by failing to disclose on the front side of the contract the existence of the acceleration clause. The Buyers alleged that the right of acceleration is a "default, delinquency or similar charge" within the meaning of Section 128(a)(9) of the Act and Section 226.8(b)(4) of the Regulation. [J.A. 5, 58][5] The Buyers did not allege or argue in the trial court that the dealers or Ford Credit had violated Section 226.8(b)(7) of the Regulation dealing with prepayment disclosures.

The trial courts concluded that the Act and the Regulation had been violated.[6] The courts held that the disclosure statements did not properly identify Ford Credit as a "creditor" and did not adequately describe the security interests. [J.A. 28-30, 32-35, 72-73] With respect to the acceleration clause, the courts held that the case of *Woods v. Beneficial Finance Co.*, 395 F. Supp. 9 (D. Ore. 1975) was controlling as a matter of "*stare decisis* and logic." [J.A. 30] In *Woods*, the Court held that, although an acceleration clause is not a "default, delinquency or similar charge" that must be disclosed under Section 226.8(b)(4) of the Regulation, it is such an important term of the contract that "henceforth a creditor must disclose and fully explain any right of acceleration in order to comply with the 'meaningful disclosure' standards of the Act." 395 F. Supp. at 16. Since the credit contract was signed by the Milhollins before the *Woods* decision

[5]The Buyers in both cases alleged numerous other violations of the Act and the Regulation. [J.A. 5, 57-59]

[6]The decision in the *Milhollin* case was reached upon the basis of the recommendations and order of a special magistrate. [J.A. 26-37] In the *Eaton* case, the court followed the *Milhollin* decision without independent analysis. [J.A. 69-71]

was issued,[7] the court in the *Milhollin* case ruled against the Milhollins on the acceleration issue. [J.A. 31] However, in the *Eaton* case the contract had been signed after the *Woods* decision was filed[8] and the court therefore ruled in favor of Eaton on this issue. [J.A. 73]

Based upon the violations of the Act and the Regulation found by the courts, a judgment for the maximum statutory damages of $1,000 and for attorney's fees, 15 U.S.C. § 1640(a) (1976), was entered against the dealer and Ford Credit in *Milhollin* and against Ford Credit alone in *Eaton*. [J.A. 41, 73, 74][9]

Both cases were appealed to the United States Court of Appeals for the Ninth Circuit. The cases were consolidated for argument because of the common questions of law they presented. The cases were also consolidated for argument with two other truth in lending actions brought against Ford Credit in which the trial courts had ruled against Ford Credit solely upon the basis that it had not been properly identified as a "creditor" in the transactions. *Andresen v. Ford Motor Credit Company*, Civ. No. 76-1090 (D. Ore., filed July 26, 1977) (opinion and judgment reprinted at pages 30a-34a of the Appendix to the Petition for a Writ of Certiorari); *Messinger v. Ford Motor Credit Company*, Civ. No. 76-475 (D. Ore., filed July 26,

[7]The *Woods* decision was filed on February 14, 1975. 395 F. Supp. 9 (D. Ore. 1975). The installment contract was signed by the Milhollins on July 12, 1974. [J.A. 9.]

[8]The installment contract was signed by Eaton on June 28, 1975. [J.A. 65]

[9]The dealer had been voluntarily dismissed from the *Eaton* case. [J.A. 60]

1977) (opinion, judgment and order reprinted at pages 35a-39a of the Appendix to the Petition for a Writ of Certiorari).

The Ninth Circuit's opinion was filed on December 28, 1978. Without deciding whether Ford Credit was a "creditor" for purposes of the Act or the Regulation, the court held that its identity was adequately disclosed on the front of the contracts. *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753, 755-57 (9th Cir. 1978). [J.A. 48] Upon this basis, the court reversed the decisions in the *Andresen* and *Messinger* cases and remanded those cases for a consideration of the other alleged violations of the Act and the Regulation. 588 F.2d at 758. [J.A. 53] However, relying solely upon the Ninth Circuit's earlier decision in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), the court held that Ford Credit had violated the Act and the Regulation in the *Milhollin* and *Eaton* cases by failing to disclose the acceleration clause under the prepayment disclosure provisions of Section 226.8(b)(7) of the Regulation. 588 F.2d at 758-59. [J.A. 50-51] The court therefore affirmed the decisions in *Milhollin* and *Eaton* and held that Ford Credit was liable to the Milhollins and Eaton for failure to disclose the acceleration clause. *Id.* [J.A. 53-54]

The dealer and Ford Credit timely filed with this Court their Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. No Petition or Cross-Petition for a Writ of Certiorari was filed by any of the plaintiffs in the four cases that had been consolidated for argument and decision. On June 18, 1979, this Court granted the Petition for a Writ of Certiorari.

Summary of Argument

The issue in these cases is whether an acceleration clause in a consumer credit contract must be disclosed under the Act or the Regulation. The Act and the Regulation describe with great particularity the various disclosures that are required to be made, in some cases even dictating the precise terminology that must be used. *See, e.g.,* Regulation Z, 12 C.F.R. §§ 226.8 (b), 226.8(c), 226.8(d) (1978). It is significant that, although specific numerical and descriptive disclosures are prescribed, neither the Act nor the Regulation specifically requires the disclosure of the existence of an acceleration clause.

Finding no provision of the Act or the Regulation expressly requiring the disclosure of acceleration clauses, the Buyers have relied upon two different Sections of the Regulation to argue that acceleration disclosures are nevertheless required. The Buyers have relied upon Section 226.8(b)(4) requiring disclosure of "the amount, or method of computing the amount, of any default, delinquency or similar charges payable in the event of late payments" and Section 226.8(b)(7) requiring disclosure of the creditor's rebate policy upon prepayment of a precomputed contract.

The Buyers have argued that the right of acceleration is a "default, delinquency or similar charge" that must be disclosed under Section 226.8(b)(4) of the Regulation. This argument finds no support in the plain meaning of the terms used in the Act and the Regulation. The terms default, delinquency and similar charges have a commonly accepted meaning in the consumer credit industry. They refer to specific pecuniary sums assessed as a result of the late payment of contract

installments. These charges are imposed upon the debtor *in lieu of acceleration* and serve to compensate the creditor for any delay in receiving installment payments.

The Buyers' argument that the right of acceleration must be disclosed as a "default, delinquency or similar charge" has been rejected by the Federal Reserve Board in an Official Staff Interpretation issued pursuant to express interpretive powers granted to the Board in the Act itself. The Official Staff Interpretation provides that the phrase "default, delinquency or similar charges" applies only to specific pecuniary sums payable in the event of the late payment of contract installments.

The Official Staff Interpretation also states that Section 226.8(b)(4) of the Regulation does not require default charge disclosures with respect to an acceleration clause as long as the creditor rebates unearned finance charges upon payment of the indebtedness after acceleration in the same manner that it rebates unearned finance charges upon voluntary prepayment where there has been no acceleration. It is undisputed that, pursuant to the contracts and Oregon state law, Ford Credit rebates unearned finance charges upon payment of the indebtedness following acceleration in the same manner that it rebates unearned finance charges upon prepayment of the indebtedness where there has been no acceleration. Applying the Board's interpretation, no default charge disclosure with respect to the acceleration clause is required under Section 226.8(b)(4) of the Regulation.

The Buyers' argument that the existence of an acceleration clause must be disclosed as a "default, delinquency or similar charge" has also been considered by the United States Court of Appeals for seven differ-

ent circuits. All seven circuits have rejected the argument. The circuits have not uniformly accepted the Board's Official Staff Interpretation that a "charge" is imposed and must be disclosed if the creditor does not rebate unearned finance charges upon payment of the indebtedness after acceleration. Some of the circuit courts, including the court below, have rejected this interpretation and held that such disclosures are never required under Section 226.8(b)(4) regardless of the creditor's rebate practice. However, the circuits are unanimous in holding that where, as here, a creditor is required to rebate unearned finance charges upon payment of the indebtedness following acceleration, no charge is imposed and no disclosures are required under Section 226.8(b)(4).

Section 226.8(b)(7) of the Regulation requires the creditor to disclose whether it rebates unearned finance charges upon prepayment of a precomputed contract and, if so, what method of rebate is employed. In an Official Staff Interpretation, the Board has stated that the creditor's method of rebating unearned finance charges upon payment of the indebtedness after acceleration need not be separately disclosed where it is the same as the disclosed method of rebate applicable to voluntary prepayment. Ford Credit's rebate policy applicable to payment of the contracts after acceleration is the same as its rebate policy applicable to voluntary prepayment; and this rebate policy is disclosed on the front of the contracts. The disclosure statements used in these cases thus comply with Section 226.8(b)(7) of the Regulation and with the Board's Official Staff Interpretation of this Section.

Section 226.8(b)(7) was brought into these cases only after they had been appealed to the Ninth Circuit.

In holding that Ford Credit had violated the Act and the Regulation, the Ninth Circuit relied solely upon its earlier decision in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977). In the *St. Germain* case, the court held that an acceleration is a prepayment so that Section 226.8(b)(7) of the Regulation requires a creditor to disclose its method of rebate upon acceleration of a consumer credit contract. In effect, the court held that when a creditor demands payment of a contract balance, that demand is treated as a full payment of the contract balance for purposes of Section 226.8(b)(7) of the Regulation. The court's decision in *St. Germain* is in conflict with the plain meaning of the term "prepayment" as used in Section 226.8(b)(7) and it also conflicts with the Board's Official Staff Interpretation of its own Regulation.[10]

The court's unprecedented and illogical holding in *St. Germain* has thrown open to question the validity of millions of disclosure forms drafted in careful compliance with the Regulation as interpreted by the Board. The court's failure to follow the Board's Official Staff Interpretation of its own Regulation violates established rules of judicial deference relating to agency interpretations. Congress has made these rules of judicial deference applicable to the Federal Reserve Board in the specific context of the Act and the Regulation.

The decision of the Ninth Circuit simply substitutes judicial disclosure preference for the express disclosure

[10]In *St. Germain,* as in these cases, the plaintiff only alleged a violation of Section 226.8(b)(4) of the Regulation relating to default, delinquency or similar charges. The plaintiff did not allege in his complaint or argue in the trial court any violation of Section 226.8(b)(7) of the Regulation relating to prepayment disclosures. In fact, the Ninth Circuit injected this issue into the case after oral argument and without the benefit of any briefing or argument by the parties.

requirements of the Act and the Regulation as interpreted by the Board. This misguided approach threatens the disclosure uniformity intended by Congress in passing the Act and undermines the central purpose of the Act which is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." Act § 102(a), 15 U.S.C. § 1601(a) (1976).

This Court should reaffirm the authority of the Federal Reserve Board to interpret and administer the Act and the Regulation and should reject those lower court decisions that have filled in perceived disclosure gaps in the Act and the Regulation by adding disclosure requirements not imposed by the Congress or the Board.

ARGUMENT

I

INTRODUCTORY STATEMENT

Although these cases are limited to issues arising under the Truth in Lending Act and the dollar amount involved in each case is small, it would be misleading to ignore the staggering volume of transactions that are subject to the Act and the Regulation and to which the principles adopted in these cases will apply. There are an estimated 60,000,000 consumer credit contracts outstanding in the United States today representing more than $265,000,000,000 in total consumer installment indebtedness.[11] Although these contracts vary significantly in their credit terms, they all contain one clause in common: an acceleration clause.[12] The issue in these cases is whether the presence of an acceleration clause in a consumer credit contract triggers any disclosure requirements under the Act or the Regulation. This Court's decision on this issue will affect millions of consumer installment contracts subject to the Act and the Regulation.

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[11] According to the Federal Reserve Board, total consumer installment indebtedness outstanding in the United States during November of 1978 was $269,445,000,000. 65 Federal Reserve Bulletin A42 (Table 1.55) (1979). Although no exact figures are available with respect to the total number of individual transactions that comprise this total, the amount of the average transaction appears to be less than $4,000. *See* Finance Facts Yearbook 1977, pp. 46-47 (published by the Consumer Credit Education Foundation, Library of Congress Catalog Card No. 61-14409). Based on this average, the estimate of 60,000,000 separate transactions is probably conservative.

[12] *See Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 264 (3d Cir. 1975); II G. Gilmore, Security Interests in Personal Property 1195 (1965) ("For a hundred years, it may be, no security agreement has failed to include an acceleration clause.").

The Court's decision in these cases could provide much needed guidance to the lower courts in interpreting the disclosure requirements of this complex Act and Regulation. The central purpose of the Act is to require the uniform disclosure of certain essential credit costs so that consumers can meaningfully comparison shop for credit. This purpose has been frustrated by court decisions that have imposed disclosure obligations upon creditors that are not explicitly or implicitly required by the Act or the Regulation.

The decision in these cases could also have far-reaching implications in defining the respective roles that the Federal Reserve Board and the courts should play in interpreting the Act and the Regulation. Congress delegated to the Board broad authority to implement, administer and interpret the Act and the Regulation. It was hoped that by placing these responsibilities with the Board, the Congressional goal of providing simple and uniform credit cost disclosures could be best achieved. This Court has recognized the broad authority conferred upon the Board by Congress and has afforded wide latitude to the Board in discharging its responsibilities under the Act. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973).

These efforts by Congress to promote simplicity and uniformity have been seriously undermined by court decisions, such as the decision below, that have rejected the Board's interpretations and substituted judicial disclosure preference for the express requirements of the Act and the Regulation. This *ad hoc* judicial approach has resulted in widespread conflict in the federal courts concerning the proper interpretation of the disclosure requirements of the Act and the Regulation. This conflict is well illustrated by the conflict in the circuit

courts on the issues in these cases.[18] The resulting confusion has left creditors with no guidance as to what disclosures are required under the Act and the Regulation. Consumers are being supplied with a bewildering array of lengthy and complex disclosure forms by creditors who are striving in good faith to satisfy the wide variety of disclosure rules imposed by the courts. This defeats the central purpose of the Act which is to provide consumers with simple and uniform credit cost disclosures so that they can meaningfully comparison shop for credit.

This Court should reverse the decision of the lower court. The disclosure statements used in these cases provided the Buyers with all of the disclosures required by the Act and the Regulation. The disclosure statements also comply with an Official Staff Interpretation of the Act and the Regulation issued by the Federal Reserve Board pursuant to express interpretive powers granted to the Board by Congress. In rejecting this Interpretation, the lower court failed to apply established rules of judicial deference to agency interpretations as recently articulated by this Court

[18]"During the past forty months, the United States Courts of Appeal for six different Circuits have examined the application of the Act and Regulation Z to acceleration clauses in consumer credit contracts. Despite the clarity of the Board's position, none of the Circuits have adopted that position in total. The Board's position has been rejected by the Ninth and Tenth Circuits, partially rejected by the Fifth Circuit, and partially followed by the Third, Fifth and District of Columbia Circuits. The Ninth Circuit has rejected decisions by the Third, Fifth and Tenth Circuits; the Eighth Circuit has rejected the approach of both the Ninth and the Fifth Circuits; the Tenth Circuit has rejected the views of the Third Circuit; and the Fifth Circuit has issued six separate, internally conflicting opinions." Petition for a Writ of Certiorari at 10, *Ford Motor Credit Company, et al. v. Milhollin, et al.*, No. 78-1487 (March 27, 1979).

in the specific context of the Act and the Regulation. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973).

II

THE INTERPRETATIONS OF THE REGULATION BY THE FEDERAL RESERVE BOARD ARE ENTITLED TO GREAT DEFERENCE AND SHOULD BE FOLLOWED BY THE COURTS UNLESS PLAINLY ERRONEOUS

In discharging its responsibilities under the Act, the Federal Reserve Board drafted a comprehensive Regulation dealing with the disclosure of credit terms in consumer credit transactions. Despite the detail and breadth of the Regulation, questions of interpretation were unavoidable both because of the complex and technical nature of the Regulation and the wide variety of credit terms offered by creditors.

In order to facilitate and encourage compliance with the Regulation, the Board has, throughout the past decade, issued various types of clarifying interpretations. In fact, each of the questions presented for decision in these cases has been specifically addressed and answered through both official and unofficial staff interpretations. Under well established principles articulated by this Court and in conformity with clearly expressed Congressional intent, these interpretations of the Board are entitled to great deference and should be followed.

A. Administrative Agencies Are Accorded Wide Latitude in Interpreting Statutes and Regulations

This Court has frequently held that the interpretations of an act by the officers or agency responsible for its administration are entitled to great deference. As long as the agency interpretation represents a reason-

able construction of the act, it should be followed even if other equally plausible interpretations are available and may even be preferred by the reviewing court. *E.g., Zenith Radio Corp. v. United States,* 437 U.S. 443, 450-51 (1978); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 371-72 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Power Reactor Development Co. v. Electricians,* 367 U.S. 396, 408 (1961); *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965).

This rule of judicial deference to agency interpretations is especially applicable where the administrative agency is interpreting its own regulation. In this context, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). *See also Thorpe v. Housing Authority,* 393 U.S. 268, 276 (1969); *Udall v. Tallman,* 380 U.S. 1, 16-17 (1965).

B. This Rule of Judicial Deference Is Especially Applicable to Interpretations of the Regulation by the Federal Reserve Board

Application of the rule of deference to interpretations of the Act and the Regulation by the Board is supported by compelling policy considerations.

1. Congress Has Granted Broad Interpretive Powers to the Federal Reserve Board

The sole responsibility for the implementation, administration and interpretation of the Act was placed with the Board. Congress drafted the Act in broad terms and charged the Board with the task of construing

the Act and determining what specific disclosures should be required. Act § 105, 15 U.S.C. § 1604 (1976). The broad interpretive powers that Congress conferred upon the Board are well-documented by the legislative history of the Act [App. A at 10-17] and have been confirmed by this Court. *See Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973).

Congress has recently reaffirmed the central role that it intended the Board to occupy in interpreting and administering the Act. In 1974, the Act was amended by adding Section 130(f) which provided that no civil liability may be imposed on a creditor whose forms were prepared in conformity with "any rule, regulation, or interpretation thereof by the Board." Act of October 28, 1974, Pub. L. No. 93-495, § 406, 88 Stat. 1518 (current version at 15 U.S.C. § 1640(f)). The Report of the Senate Committee concerning this new Section of the Act explained that it had a dual purpose. First, the Section was intended to protect creditors against civil liability where their disclosure forms were in conformity with Board interpretations of the Act and the Regulation. [App. A at 14] Second, and equally important, the Section was intended to encourage the Board to exercise its broad interpretative powers to simplify and standardize disclosure requirements, thus reducing the compliance burden on creditors while at the same time making disclosures more uniform and understandable to consumers. [App. A at 14-15]

In 1976, Section 130(f) was amended so that its protections would apply not only to Board interpretations, but also to "any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor . . . ." Pub. L. No. 94-222, 90 Stat. 197 (codified at 15 U.S.C. § 1640(f) (1976)).

The express terms of the Act and its legislative history thus evince a clear Congressional desire that the Board be afforded wide latitude in interpreting the disclosure requirements of the Act and the Regulation. This Congressional intent should not be disregarded by the courts. The interpretations of the Board should be followed unless they are plainly erroneous.

2. A Rule of Special Deference to the Federal Reserve Board Will Promote the Overriding Purpose of Uniformity in Credit Cost Disclosures

The central purpose of the Act is to require uniform credit cost disclosures so that the consumer can be given meaningful information that will permit him to comparison shop for credit. Act § 102(a), 15 U.S.C. § 1601(a) (1976). The Committee Report accompanying the original House Bill makes this point forcefully:

> "The committee believes that by requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional mandatory charges imposed by the creditor as an incident to credit be included in the computation of the applicable percentage rate, the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit." H.R. Rep. No. 1040, 90th Cong., 1st Sess. 13 (1967).

Section 130(f) was added to the Act in 1974 and was amended in 1976 for the express purpose of provid-

ing the Board and its staff with the authority necessary to promote the Congressional goal of uniformity.

Only a rule of affording great deference to Board interpretations will permit the goal of uniformity to be realized. If the courts are allowed to substitute judicial disclosure preference for the clear requirements of the Act and the Regulation as interpreted by the Board, the confusion and uncertainty that has brought these cases to this Court will continue, and will undoubtedly worsen.

3. The Federal Reserve Board Possesses the Unique Level of Expertise Necessary to Interpret the Technical Requirements of the Act and the Regulation

In the execution of its responsibilities under the Act, the Board has been able to draw upon an accumulation of information and resources that are not readily accessible to courts in the traditional adversary setting.[14] In doing so, the Board has developed a level of expertise in the complex task of regulating credit disclosures that is not easily achieved by courts of general jurisdiction which are presented with isolated questions arising under the Act and Regulation only on a sporadic basis.

The Board's special expertise has enabled it to make informed policy decisions about the disclosure requirements necessary to implement the purposes of the Act. This specialized expertise has been acknowledged by this Court. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 365 (1973). In *Bone v. Hibernia*

[14]In issuing interpretations, the Board has adopted procedures aimed at gathering relevant data and comments from all interested parties. Regulation Z, 12 C.F.R. § 226.1(d) (1978).

Bank, 493 F.2d 135 (9th Cir. 1974), the Ninth Circuit also acknowledged this expertise in deferring to an Official Board Interpretation of Section 226.8(b)(7) of the Regulation:

> "We believe that it is precisely these kinds of policy decisions about the disclosure statement, requiring the weighing and balancing of the various available choices, that Congress entrusted to the Federal Reserve Board by granting it such broad powers. The conclusions thus reached by the Board are based upon its specialized experience and access to information, which is not likely to come to the attention of a particular judge in a given case. While reasonable minds may differ as to which alternative would best suit the purposes of the Act, 'courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority.' *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 372, 93 S. Ct. 1652, 1662, 36 L. Ed. 2d 318 (1973)." 493 F.2d at 140.

Application of a rule of special deference to Board interpretations, especially those of an official nature, both recognizes this specialized expertise and provides the Board with the flexibility necessary to respond to changing credit practices and disclosure needs.

4. Important Reliance Interests Will Be Protected by a Rule of Special Deference

This Court has recognized that special deference may be appropriate with respect to an agency interpretation where reliance interests are likely to have intervened. *See Train v. Natural Resources Defense Council*, 421 U.S. 60, 87 (1975); *Udall v. Tallman*, 380 U.S.

1, 18 (1965). Substantial policy considerations, grounded in concepts of fairness, support this rule of special deference where reliance interests have intervened. These policy considerations are especially applicable to Board interpretations of the Act and the Regulation.

Creditors must comply with the disclosure requirements of the Act and the Regulation or be subject to severe penalties, including potentially enormous class action claims.[15] Relying upon Board interpretations, printed forms have been developed by creditors who have attempted in good faith to comply with the Act and the Regulation. These forms have been used in the literally millions of consumer credit transactions that are entered into each year. Absolute chaos will result if courts "second-guess" the Board and adopt a construction of the Act or the Regulation that is inconsistent with a Board interpretation. Creditors attempting in good faith to comply with the law could place no confidence in the Board's uniform guidelines offered to assist them and instead would be subject to the vagaries of conflicting and unpredictable interpretations of the Act and the Regulation by trial and appellate courts across the land.[16]

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[15]Under Section 130(a)(2)(B) of the Act, 15 U.S.C. § 1640 (a)(2)(B) (1976), a creditor is exposed to class action liability of up to the lesser of $500,000 or 1% of the creditor's net worth.

[16]Although Section 130(f) of the Act provides a measure of protection against civil liability where a disclosure is found to be in conformity with an Official Board or Staff Interpretation, this Section does not apply to unofficial Staff Interpretations and is clouded by the uncertain requirement that the creditor act "in good faith." *See Basham v. Finance America Corp.*, 583 F.2d 918, 923 n.7 (7th Cir. 1978), *cert. denied*, 99 S.Ct. 1046 (1979), suggesting that a creditor may not be acting in good faith if at least one circuit court has declined to follow a Board interpretation.

C. This Court Should Resolve the Conflict in the Circuits Concerning the Weight to Be Accorded Federal Reserve Board Interpretations of Its Regulation

Despite the considerations discussed above and the critical need for certainty concerning the weight to be given Board interpretations, the circuits are badly split on this issue. This conflict is best illustrated by the position taken by the circuits on the very issues presented in these cases.

The Board has issued an Official Staff Interpretation and several Staff Letters concerning the disclosure requirements incident to an acceleration clause in a consumer credit contract.[17] The Third and District of Columbia Circuits appear to have accepted the Board's position. *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975); *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1978). The Tenth Circuit has rejected the Board's position. *Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977). The Fifth Circuit initially rejected the Board's position, *Martin v. Commercial Securities Co., Inc.*, 539 F.2d 521 (5th Cir. 1976), later reversed itself prospectively and adopted the Board's position as the "rule of decision," *McDaniel v. Fulton National Bank*, 571 F.2d 948, 951 (5th Cir. 1978) (*en banc*) and has since retreated slightly from the Board's position. *McDaniel v. Fulton National Bank*, 576 F.2d 1156 (5th Cir. 1978) (opinion on denial of rehearing *en banc*). The Ninth Circuit has partially followed the Board's position and partially rejected it. *St. Ger-*

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[17]These interpretations are reproduced in Appendix B to this Brief and are discussed in parts IV B and V B of the Brief.

main v. Bank of Hawaii, 573 F.2d 572 (9th Cir. 1977).

The decisions within individual circuits even conflict with each other on the weight to be given Board interpretations of the Regulation. *Compare St. Germain v. Bank of Hawaii,* 573 F.2d 572 (9th Cir. 1977) (rejecting an Official Staff Interpretation of Section 226.8(b)(7) of the Regulation), *with Bone v. Hibernia Bank,* 493 F.2d 135 (9th Cir. 1974) (affording controlling weight to an Official Board Interpretation of the same Section of the Regulation).

What emerges from the conflict in the circuits concerning Board interpretations is the lack of a clear standard of judicial review applicable to such interpretations. The resulting confusion has had two unsettling effects. First, it has left creditors with no degree of assurance that they can safely rely on what the Board says they must disclose. Second, it has prompted an unprecedented explosion of litigation in the federal courts[18] which has further aggravated the conflict.

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[18]Since 1972, over 11,000 Truth in Lending cases have been brought in the federal courts alone. *See* Brief for Amici Curiae, National Consumer Finance Association, Consumer Bankers Association and General Motors Acceptance Corporation, in Support of Petition for a Writ of Certiorari, at 5, *Ford Motor Credit Company, et al. v. Milhollin, et al.,* No. 78-1487 (April 19, 1979). The following statement was recently made by Senator Garn in support of proposed legislation to simplify the Act:

> "One of the most shocking aspects of the Truth in Lending Act is the ever-growing burden being placed upon the Federal court system by the multiplicity of suits based on nonwillful technical violations of the act. We received shocking evidence in March of 1976 before the Senate Consumer Affairs Subcommittee establishing that litigation based on the punitive damage provision of the Truth in Lending Act is seriously encumbering the work of the Federal courts in certain sections of the country." 123 Cong. Rec. S7487 (daily ed. May 12, 1977).

In order to restore the harmony that Congress intended, this Court should resolve the conflict in the circuits and hold that Board interpretations of the Act and the Regulation are entitled to great deference and should be followed unless they are plainly erroneous.

III

THE COURTS SHOULD NOT DEFEAT THE PURPOSES OF THE ACT BY IMPOSING DISCLOSURE REQUIREMENTS NOT EXPRESSLY REQUIRED BY THE REGULATION

The considerations discussed above strongly suggest that, without regard to whether the Board has interpreted the Act or the Regulation, the courts should not defeat the purposes of the Act by imposing disclosure obligations upon creditors that are not expressly required by the Regulation.

Although the purposes of the Act are stated in broad terms in Section 102, the Act and the Regulation are very specific about what disclosures are required to carry out these purposes. The Regulation thus requires that specific credit cost disclosures be given, most of which relate to numerical amounts. 12 C.F.R. §§ 226.8(b), 226.8(c), 226.8(d) (1978). To insure that these disclosures will be provided to the consumer in a meaningful and understandable fashion, the Regulation requires that they be made clearly, conspicuously and in meaningful sequence, 12 C.F.R. § 226.6(a) (1978), and on the same side of a single page, 12 C.F.R. § 226.8(a) (1978). The creditor may not disclose additional information if such additional information would mislead or confuse the consumer or contradict, obscure or detract attention from the information required to be disclosed by the Regulation.

12 C.F.R. § 226.6(c) (1978). Congress and the Board were justifiably concerned that overdisclosure of credit information would confuse and mislead credit shoppers and would destroy the desired uniformity in credit disclosures.

This desire for simplicity and uniformity in credit cost disclosures has been seriously undermined by the approach used by many courts that have imposed disclosure obligations upon creditors that are not expressly required by the Regulation. In furthering their own notions of what should be disclosed, these courts have either added new disclosure requirements found nowhere in the Act or the Regulation, *e.g.*, *Woods v. Beneficial Finance Co.*, 395 F. Supp. 9, 16 (D. Ore. 1975) (holding that an acceleration clause should be disclosed "under the spirit of the Act" because it is "an obvious concern" to the customer) or have adopted strained and illogical interpretations of the specific disclosure requirements of the Regulation to reach the same result, *e.g.*, *Garza v. Chicago Health Clubs, Inc.*, 347 F. Supp. 955 (N.D. Ill. 1972) (holding that the word "charge" in Section 226.8(b)(4) includes the creditor's right of acceleration).

This shift in approach from the straightforward disclosure of simple and precise credit costs to a requirement that all relevant credit terms be disclosed has forced creditors to employ lengthy and unwieldy disclosure statements to protect against expansive interpretations of the disclosure requirements of the Regulation. These lengthy disclosure statements are likely to be both nonuniform and confusing to consumers, thus defeating the purpose of the Act. *See* Landers, *Some Reflections On Truth In Lending*, 1977 U. Ill. L.F. 669, 674-76; *Kessler v. Associates Financial Services Co.*, 573 F.2d 577, 578 (9th Cir. 1977); *Mirabal v. General Motors Acceptance Corp.*, 537 F.2d 871, 888 (7th Cir. 1976) (Moore, J., dissenting).[19]

In order to return to the simple and uniform disclosure format intended by the Congress and the Board, creditors should only be obligated to disclose the credit information expressly required by the Regulation. In *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978), the court rejected an argument that acceleration clause disclosures are required, and observed:

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[19]There is growing concern in Congress that this overdisclosure of credit information is defeating the purposes of the Act. In testimony before the United States Senate concerning a bill that would have simplified the disclosure requirements of the Act, Senator Proxmire stated:

> "As the sponsor of the original Truth in Lending Act I am becoming more and more concerned that its beneficial purposes are being frustrated by unnecessarily complex disclosure requirements which consumers may ignore or fail to understand.
>
> In addition, the very complexity of the requirements may impose significant costs and other burdens on creditors despite their good faith efforts to comply with the law." 122 Cong. Rec. 23609 (1976).

This concern was repeated in a Report of the Senate Committee on Banking, Housing and Urban Affairs:

> "Despite the act's clear successes, however, there is a growing belief among consumers and creditors alike that the act could be substantially improved. There is considerable evidence, for example, that disclosure forms given consumers are too lengthy and difficult to understand. Creditors, on the other hand, have encountered increasing difficulty in keeping current with a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions. There is also evidence that many creditors have sincerely tried to comply with the act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation." S.Rep. No. 720, 95th Cong., 2d Sess. 2 (1978).

> "In our judgment, no such additional disclosure requirement is either explicit or implicit in the language of the Regulation. To the extent the absence of such a disclosure requirement may be perceived by the courts as a hole in the regulatory matrix, only the Federal Reserve Board is authorized to fill the hole. It is for the Board itself, not the courts, to assess the potential impact of the exercise of the right of acceleration upon the credit customer and on the basis thereof to determine whether to explicitly expand the existing disclosure requirements. We are unwilling to usurp the prerogatives of the Board." 577 F.2d at 460.

See also Martin v. Commercial Securities Co., Inc., 539 F.2d 521, 525-26 (5th Cir. 1976); *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 269 (3d Cir. 1975).

In view of the penal nature of the civil liability provisions of the Act, the courts should not impose disclosure obligations that are not clearly required by the Regulation. Section 130(a)(2) of the Act, 15 U.S.C. § 1640(a)(2) (1976), provides that, in addition to recovering actual damages for a violation of the Act, the consumer may recover twice the amount of the finance charges imposed in the transaction, with such liability not to be less than $100 nor in excess of $1,000. This civil liability is penal in nature and applies without regard to whether the violation was intentional or the debtor suffered any damages. *See Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 375-76 (1973); *Williams v. Public Finance Corp.*, 598 F.2d 349, 359 (5th Cir. 1979); *Charles v. Kraus Co.*, 572 F.2d 544, 546 (5th Cir. 1978).

This penal aspect of the Act will not justify an interpretation of the Regulation that would permit a creditor to escape its express provisions. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 375 (1973). However, it does suggest that the courts should not adopt strained or novel interpretations of the Regulation with the result that creditors are subjected to heavy penalties for failing to make disclosures not clearly required by the express terms of the Regulation.

IV

THE DISCLOSURE STATEMENTS COMPLY WITH THE ACT AND THE REGULATION CONCERNING THE DISCLOSURE OF DEFAULT, DELINQUENCY OR SIMILAR CHARGES

Section 128(a)(9) of the Act, 15 U.S.C. § 1638 (a)(9) (1976), requires the creditor to disclose "[t]he default, delinquency, or similar charges payable in the event of late payments." Section 226.8(b)(4) of the Regulation, 12 C.F.R. § 226.8(b)(4) (1978), implements this Section of the Act by requiring the disclosure of "[t]he amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments."

The Buyers alleged in their complaints and argued in the courts below that the above provisions of the Act and the Regulation require a creditor to disclose the existence of an acceleration clause as a default, delinquency or similar charge. The Ninth Circuit has rejected this argument in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977), holding that the phrase "default, delinquency or similar charges" refers only to specific pecuniary sums payable in the event of default. The Buyers' argument has also been

rejected by the Federal Reserve Board in an Official Staff Interpretation and by every federal court of appeals which has considered it. This unanimous rejection of the Buyers' argument is well grounded in a careful analysis of the applicable Sections of the Act and the Regulation.

A. The Default Charge Disclosure Requirements of the Act and the Regulation Apply Only to Specific Pecuniary Sums Payable With Respect to the Late Payment of Contract Installments

Since the terms "default, delinquency or similar charges" are not defined in the Act or the Regulation, established rules of statutory construction require an analysis of the commonly accepted meaning of the terms as well as the purposes and legislative history of the Act and Regulation of which they are a part. *See United States v. America Trucking Assn.*, 310 U.S. 534, 543 (1940).

1. The Plain Meaning of the Terms Used in the Act and the Regulation Establish That Only Specific Pecuniary Sums Payable in the Event of Late Payment of Contract Installments Must Be Disclosed

In construing the terms "default, delinquency or similar charges," an effort should be made to recognize and give effect to the generally accepted meaning of the terms as used by Congress and the Board. *Corning Glass Works v. Brennan*, 417 U.S. 188, 201-02 (1974); *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 265-66 (3d Cir. 1975). The terms "default charge" and "delinquency charge" have acquired generally accepted meanings in the consumer credit industry. The terms are used to describe "the compensation a creditor receives on a precomputed contract for the debtor's delay in making timely instalment payments." 1 Cons. Cred. Guide (CCH) ¶ 4230. The terms do not include the creditor's right of acceleration. In fact, default and delinquency charges are imposed in lieu of acceleration:

> "Because a precomputed contract is the only one prepared on the assumption that the debtor will make all payments when due, the creditor is left without any income for a period where payment is delayed. *In lieu of accelerating the maturity* of the entire obligation, the creditor may make an appropriate charge just for the delay on the particular instalment." 1 Cons. Cred. Guide (CCH) ¶ 4231 (emphasis added). *See also* Uniform Consumer Credit Code § 2.203 and Official Comments, 1 Cons. Cred. Guide (CCH) ¶ 5063.

That Congress intended "default, delinquency and similar charges" to have this generally accepted meaning is made clear by the addition of the qualifying language "*payable* in the event *of late payments.*" It is significant that both the Act and Regulation require only the disclosure of those charges that are related to late payments made by the consumer. Congress and the Board chose not to require the disclosure of all of the consequences that may follow from the consumer's total failure to make any payment under the contract.

This commonly accepted meaning of the terms "default charge" and "delinquency charge" is employed in state retail installment sales acts that describe the specific additional charges that may be assessed against the debtor as a result of the late payment of contract

installments. The Oregon statute applicable to the contracts in these cases is typical:

> "The holder of a retail instalment contract may, if the contract so provides, collect a *delinquency charge* on each instalment in default for a period of 10 days or longer. The *delinquency charge* for any instalment shall not exceed five percent of the delinquent instalment or $5, whichever is less." O.R.S. § 83.590 (1977-1978) (emphasis added).[20]

An acceleration clause is unlike the types of charges referred to in the Oregon statute. It is not a specific sum of money. In the context of the specific wording of Section 226.8(b)(4), an acceleration clause is not an "amount" that can be disclosed; nor is it "payable" with "late payments." An acceleration clause is a contract remedy that allows the creditor, upon the debtor's default, to demand that the entire indebtedness be paid prior to its scheduled maturity date. An acceleration clause is no more a "default, delinquency or similar charge" than any other contract remedy such as the creditor's right to repossess and sell collateral or collect a deficiency judgment.

[20]The retail installment sales acts in effect in other states contain similar provisions concerning default and delinquency charges. They are cited and summarized at 1 Cons. Cred. Guide (CCH) ¶ 520. These types of default and delinquency charges were prevalent at the time the Act was passed, *see* Curran, Trends in Consumer Credit Legislation 71-72 (American Bar Foundation 1965), and were regulated by statute. *Id.* at 102-03.

2. Neither Congress nor the Federal Reserve Board Intended to Require the Disclosure of Acceleration Clauses

The right of acceleration, like many other creditor remedies upon default,[21] is an important term of a consumer credit contract. However, despite the universal use of acceleration clauses,[22] such clauses are not mentioned in the Act, the Regulation or the legislative history. The reason for this is apparent. In drafting the Act, Congress did not intend to require the disclosure of every single credit term involved in each transaction. Instead, the focus of Congress was on the disclosure of certain essential, quantifiable credit costs that would facilitate comparison shopping by consumers. This approach is reflected in both the legislative history [App. A at 2-8] and the specific provisions of the Act. Thus, with few exceptions, the disclosures required by the Act relate to credit costs that can be disclosed in numerical amounts. Act §§ 128, 129, 15 U.S.C. §§ 1638, 1639 (1976). The disclosures required by the Regulation follow the same theme. Regulation Z, 12 C.F.R. §§ 226.8(b), 226.8(c), 226.8(d) (1978). The failure of either the Act or the Regulation to require the disclosure of acceleration clauses, while explicitly defining the other disclosures that are required, is strong evidence that their disclosure was not expected.

Moreover, other provisions of the Act and the Regulation strongly suggest that Congress and the Board

[21]Most installment sale contracts provide for a variety of remedies upon the debtor's default such as the repossession and sale of collateral, the recovery of expenses of repossession and sale, and the recovery of a deficiency judgment, court costs and attorney's fees. State laws add other enforcement remedies such as replevin, attachment and execution.

[22]*See* note 12 *supra*.

intended to *exclude* a requirement for the disclosure of creditor remedies, including the right of acceleration. Section 124 of the Act, 15 U.S.C. § 1634 (1976), provides that:

> "If information disclosed in accordance with this chapter is subsequently rendered inaccurate as the result of any act, occurrence, or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this chapter."

This provision is repeated in the Regulation, 12 C.F.R. § 226.6(g) (1978), with the following explanatory footnote:

> "Such acts, occurrences, or agreements include the failure of the customer or lessee to perform his obligations under the contract *and such actions by the creditor or lessor as may be proper to protect his interests in such circumstances.*" 12 C.F.R. § 226.6(g) n.6 (1978) (emphasis added).

The Senate Report on Section 4(h) of the Senate Bill, which ultimately became Section 124 of the Act, makes it clear that the creditor's exercise of the remedies of acceleration, repossession and sale are considered subsequent events or occurrences even though the resultant shortening of the credit term would affect the interest rate.[23]

[23] "A repossession permitted by State law but not mutually agreed to by both parties would affect the rate. The new language [§ 124] makes it clear that such a change would not violate the act." S.Rep. No. 392, 90th Cong., 1st Sess. 18 (1967).

3. The Disclosure Statements in These Cases Disclose All Default, Delinquency or Similar Charges Payable in the Event of the Late Payment of Contract Installments

Paragraph 12 on the front side of the installment sale contracts signed by the Buyers in these cases provides for and discloses default and delinquency charges as follows:

> "(12) Delinquency Charges: Buyer hereby agrees to pay a delinquency charge on each installment in default for more than 10 days in the amount of 5% thereof or $5.00, whichever is less, plus such expenses incurred by Seller in effecting collection hereunder as may be allowed by law." [J.A. 9, 65]

Since these are the only monetary charges payable with respect to the *late payment* of contract installments, the dealers and Ford Credit have made all disclosures required by Section 128(a)(9) of the Act and Section 226.8(b)(4) of the Regulation.

B. The Federal Reserve Board Has Issued an Official Staff Interpretation Stating That No Default, Delinquency, or Similar Charge Disclosures Are Required With Respect to an Acceleration Clause if the Creditor Rebates Unearned Finance Charges Upon Payment of the Indebtedness After Acceleration in the Same Manner That It Rebates Unearned Financc-Charges Upon Voluntary Prepayment

On April 4, 1977, the Board issued an Official Staff Interpretation in which it considered whether the presence of an acceleration clause in a consumer credit contract gives rise to any disclosure obligations under Section 128(a)(9) of the Act or Section 226.8(b)(4) of the Regulation. The Official Staff Interpretation

was preceded by one unofficial Staff Letter and followed by two others, all concerning the same question.[24]

1. Staff Letter No. 851

In Staff Letter 851, issued on October 22, 1974, the staff addressed itself to the question of whether an acceleration clause is a "charge" that must be disclosed under Section 226.8(b)(4) of the Regulation. In the letter, the staff stated:

> "For the purposes of the Truth in Lending disclosures, this staff views an acceleration of payments as essentially a prepayment of the contract obligation. . . .
>
> If, under the acceleration provision, a rebate is made by the creditor in accordance with the disclosure of the rebate provisions of § 226.8(b)(7), we believe that there is no *additional* 'charge' for late payments made by the customer and therefore no need to disclose under the provisions of § 226.8(b)(4). On the other hand, if upon acceleration of the unpaid remainder of the total of payments, the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed in § 226.8(b)(7), any amounts retained beyond those which would have been rebated under the disclosed rebate provisions represent a 'charge' which should be disclosed under § 226.8(b)(4)." [App. B at 21] (emphasis in original).

The statement that the staff viewed an "acceleration of payments as essentially a prepayment of the contract obligation" could be interpreted to mean that the staff

[24]The Official Staff Interpretation and the three Staff Letters are reprinted in Appendix B to this Brief.

viewed the act of acceleration as constituting a prepayment. An alternative and more reasonable interpretation is that the staff viewed *payment* after acceleration as essentially a form of prepayment. The Official Staff Interpretation expressly adopts the latter view.

2. Official Staff Interpretation No. FC-0054

Because of continuing litigation and uncertainty over the acceleration question and the Board's position with respect thereto, on April 4, 1977 the Board issued an Official Staff Interpretation.[25] The Official Staff Interpretation began by stating that the creditor's right of acceleration upon default is not by itself a default, delinquency or similar charge:

> "It is staff's opinion that the phrase 'default, delinquency, or similar charges in the event of late payments,' found in § 128(a)(9) and § 129(a)(7) of the Truth in Lending Act and § 226.8(b)(4) of Regulation Z, refers to specific sums assessed against a borrower solely because of failure to make payments when due. It is staff's opinion that the mere right to accelerate contained in a contractual provision which sets out the creditor's right to accelerate the entire obligation upon a certain event (generally the obligor's failure to make a payment when due) is not a *charge*

[25]This Official Staff Interpretation was issued pursuant to procedures adopted by the Board implementing Section 130(f) of the Act, 15 U.S.C. § 1640(f) (1976). The procedures call for the publication of a proposed Official Staff Interpretation in the Federal Register and the solicitation of public comment with respect to the proposed Interpretation. The procedures currently in effect are found in Section 226.1(d) of the Regulation, 12 C.F.R. § 226.1(d) (1978). The procedures in effect when Official Staff Interpretation No. FC-0054 was issued varied only slightly from those currently in effect. *See* 41 Fed. Reg. 28255-56 (July 9, 1976).

payable in the event of late payment. Therefore, it need not be disclosed under § 226.8(b)(4)." [App. B at 19] (emphasis in original).

With respect to the rebate analysis in Staff Letter 851, the Official Staff Interpretation clarified Staff Letter 851 by stating that the Staff views *payment* upon acceleration as a form of prepayment:

"You refer to a prior Public Information Letter, No. 851, which discusses the right of acceleration. Staff believes that letter addresses a different issue than the one posed in your letter. *Staff understands that letter to say that early payment of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation.* Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under § 226.8 (b)(7) *when the customer pays the balance of the obligation upon acceleration,* any amounts retained beyond those which would have been rebated under the disclosed rebate provisions do represent the type of charge that must be disclosed under § 226.8(b)(4)." [App. B at 19] (emphasis added).

3. Staff Letters 1208 and 1324

In Staff Letter 1208 issued on July 6, 1977, the staff commented upon the disclosure requirements applicable where the disclosure statement provides for a rebate of unearned finance charges upon prepayment and the contract contains an acceleration clause but neither the rebate disclosure nor the acceleration clause refer to any rebate upon payment after acceleration:

"The fact that the contract is silent concerning rebate upon prepayment after acceleration is not determinative of the issue; the question is whether in fact the creditor does or does not rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement. In this sense, then, the individual creditor's policy determines whether there is a violation of the Act and regulation." [App. B at 23].

Staff Letter 1324 issued on November 14, 1978 [App. B at 23-26] essentially repeated the analysis found in the Official Staff Interpretation No. FC-0054 and Staff Letter 1208.

4. Summary of the Board's Position

The Board's position expressed in Official Staff Interpretation No. FC-0054 and Staff Letters 851, 1208 and 1324 can be summarized as follows:

1. The right of acceleration is not itself a default, delinquency or similar charge within the meaning of Section 128(a)(9) of the Act or Section 226.8(b)(4) of the Regulation. Those sections only apply to specific pecuniary charges payable in the event of a late payment.

2. The Board views a *payment* in full of the indebtedness after acceleration as "essentially" the same as a prepayment. The Board does not view an acceleration of the indebtedness as itself a prepayment.

3. If the creditor rebates unearned finance charges upon payment in full of the indebtedness after acceleration in the same manner as it rebates such unearned finance charges in the event of a prepayment where there has been no acceleration,

no default, delinquency or similar charge has been imposed and no disclosures are required under Section 128(a)(9) of the Act or Section 226.8 (b)(4) of the Regulation.

5. Application of the Board's Interpretation to the Contracts in These Cases

Paragraph 14 on the front side of the contracts in these cases discloses the buyer's right to a rebate of unearned finance charges in the event of a prepayment of the indebtedness. [J.A. 9, 65] This provision of the contract and Oregon state law both require the holder of the contract to rebate unearned finance charges upon full payment of the contract indebtedness regardless of whether the full payment occurs before or after an acceleration of the installment due dates. Ford Credit's practice in all cases is to adhere to these requirements.

Applying the Board's interpretation, all default, delinquency or similar charge disclosures have been made with respect to the contracts in these cases.

C. Every Federal Court of Appeals Opinion in Which the Acceleration Issue Has Been Decided Has Held That No Default Charge Disclosure Is Necessary With Respect to an Acceleration Clause Where the Creditor Is Required to Rebate Unearned Finance Charges Upon Payment of the Indebtedness After Acceleration

1. The Federal Courts of Appeals Have Unanimously Held That the Right of Acceleration Is Not a Default, Delinquency or Similar Charge

Every federal appellate court that has considered the issue, including the Ninth Circuit in the decision below, has held that an acceleration clause is not a "charge" required to be disclosed under Section

128(a)(9) of the Act or Section 226.8(b)(4) of the Regulation. *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975); *Martin v. Commercial Securities Co., Inc.*, 539 F.2d 521 (5th Cir. 1976), *as modified prospectively in McDaniel v. Fulton National Bank*, 571 F.2d 948 (5th Cir.) (*en banc*), *reh. denied*, 576 F.2d 1156 (5th Cir. 1978) (*en banc*); *Croysdale v. Franklin Savings Assn.*, App. No. 78-1364 (7th Cir., filed July 12, 1979); *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978); *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977); *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753 (9th Cir. 1978) (following *St. Germain*); *Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977); *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1978).

2. The Federal Courts of Appeals Have Unanimously Held That Default Charge Disclosures Need Not Be Made With Respect to an Acceleration Clause if the Creditor Is Required to Rebate Unearned Finance Charges Upon Prepayment After Acceleration

The federal appellate courts are also unanimous in holding that no default charge disclosures with respect to an acceleration clause are required under Section 226.8(b)(4) where the creditor is required to rebate unearned finance charges upon payment of the indebtedness after acceleration.

Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257 (3d Cir. 1975), was the first federal appellate court decision to consider the acceleration question. In *Johnson*, the acceleration clause in the contract did not expressly provide for a rebate of unearned finance charges upon payment of the indebtedness al-

though a state statute required the rebate of unearned finance charges upon "liquidation" of the indebtedness prior to maturity. 527 F.2d at 265 n.13. The Third Circuit held that no default charge disclosure with respect to an acceleration clause is required under Section 226.8(b)(4) where the creditor rebates unearned finance charges in accordance with the state statute. The *Johnson* decision was followed by the District of Columbia Circuit in *Price v. Franklin Investment Co., Inc.*, 574 F.2d 594 (D.C. Cir. 1978).

The Fifth Circuit's position was first articulated in *Martin v. Commercial Securities Co., Inc.*, 539 F.2d 521 (5th Cir. 1976). In *Martin*, the court held that acceleration disclosures are not required regardless of the creditor's rebate practice. This "never disclose" rule of the Fifth Circuit was later adopted by the Tenth Circuit in *Begay v. Ziems Motor Co.*, 550 F.2d 1244 (10th Cir. 1977). *See also United States v. One 1976 Chevrolet Station Wagon*, 585 F.2d 978 (10th Cir. 1978).

In *McDaniel v. Fulton National Bank*, 571 F.2d 948 (5th Cir. 1978), the Fifth Circuit, sitting *en banc*, reconsidered its decision in *Martin* in light of the subsequently issued Official Staff Interpretation No. FC-0054. The court approved the *Martin* holding that the right of acceleration need not be disclosed under Section 226.8(b)(4). 571 F.2d at 950. However, the court prospectively overruled the holding in *Martin* that default charge disclosures are never required with respect to an acceleration clause regardless of the creditor's rebate practice. The court adopted the Official Staff Interpretation "as the rule of decision in these cases" effective 90 days from the date of the decision. 571 F.2d at 951. In an opinion denying a petition for

rehearing, the court in *McDaniel* clarified its opinion by observing that default charge disclosures will be required in the Fifth Circuit if the creditor has the contract right to collect unearned finance charges upon payment of the indebtedness after acceleration regardless of whether that contract right is actually enforced by the creditor. Without citing Staff Letter 1208, the court appears to have rejected it. *McDaniel v. Fulton National Bank*, 576 F.2d 1156, 1157 (5th Cir. 1978) (opinion on denial of rehearing *en banc*).

In *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978), the Eighth Circuit held that acceleration disclosures are not required under Section 226.8(b)(4). Although the court seems to have adopted the "never disclose" rule of the *Martin* case, 577 F.2d at 460, it observed that its holding was consistent with both the Board's Official Staff Interpretation No. FC-0054 and the decision of the Third Circuit in *Johnson* since the creditor's policy and the state statute required a rebate of unearned finance charges upon payment of the indebtedness after acceleration. *Id.*

The Ninth Circuit in *St. Germain v. Bank of Hawaii*, 573 F.2d 572, 575, 577 (9th Cir. 1977), rejected the Board's Official Staff Interpretation and held that acceleration disclosures are never required under Section 226.8(b)(4) regardless of the creditor's rebate policy or state law. *Accord, Milhollin v. Ford Motor Credit Company*, 588 F.2d 753, 757-58 (9th Cir. 1978) (following *St. Germain*); *Kessler v. Associates Financial Services Co.*, 573 F.2d 577 (9th Cir. 1977) (following *St. Germain*). The Seventh Circuit appears to have adopted the Ninth Circuit's position. *Croysdale v. Franklin Savings Assn.*, App. No. 78-1364 (7th Cir., filed July 12, 1979).

Although the foregoing decisions do not reflect total consistency or uniformity with each other or with the Board, they all share one common theme: if a creditor is required to rebate unearned finance charges upon payment of the indebtedness after acceleration, no disclosures are required with respect to an acceleration clause under Section 226.8(b)(4) of the Regulation.

V

THE DISCLOSURE STATEMENTS MAKE ALL PREPAYMENT DISCLOSURES REQUIRED BY THE REGULATION

A. Section 226.8(b)(7) of the Regulation Requires the Disclosure of the Creditor's Method of Rebating Unearned Finance Charges Upon Payment in Full of the Indebtedness Prior to Its Maturity Date

1. Introductory Statement

In a precomputed contract, if the debtor prepays the full contract balance, including precomputed finance charges, prior to the scheduled maturity date, the creditor receives a premium in the form of "unearned" finance charges. For this reason, most retail installment sales acts require the creditor to rebate to the debtor any unearned finance charges resulting from the debtor's prepayment of the balance due on a precomputed contract. The Oregon statute in effect when the contracts in these cases were signed is typical:

> "Notwithstanding the provisions of a retail instalment contract to the contrary, the buyer may pay in full at any time before maturity the obligation contained in the retail instalment contract. Upon such premature payment, the buyer shall received a refund credit." O.R.S. § 83.620 (1975-1976).[26]

The Truth in Lending Act does not require any disclosures with respect to the rebate of unearned finance charges upon prepayment of a precomputed contract. However, Section 226.8(b)(7) of the Regulation provides:

> "(b) In any transaction subject to this section, the following items, as applicable, shall be disclosed:
>
> . . . .
>
> (7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed."

2. The Term "Prepayment" as Used in Section 226.8(b)(7) Refers to a Payment in Full of the Indebtedness Prior to Its Maturity Date

The plain meaning of the term "prepayment" as used in Section 226.8(b)(7) of the Regulation is a payment in full of the indebtedness prior to its originally scheduled maturity date. This is clear from the fact

[26] The state laws providing for the rebate of unearned finance charges upon prepayment are reproduced at 2-4 Cons. Cred. Guide (CCH) at ¶ 4460.

that, until such a payment has been made, there are no unearned finance charges for the creditor to rebate. As long as the debtor has the continued use of the credit that was extended to him, the creditor continues to "earn" all precomputed finance charges.

The legislative history of Section 226.8(b)(7) confirms this obvious fact. [App. A at 8-10] The original Senate Bill required the disclosure of "the terms applicable in the event of advanced . . . payments" [App. A at 8]; and the Senate Report accompanying the final version of the Senate Bill referred to the rebate of unearned finance charges "if the debt is paid early." [App. A at 8] The Conference Report likewise referred to the disclosure of prepayment penalties "at the time of completion of a consumer credit transaction" and the rebate policy applicable in case of prepayment of an installment contract "in terms of amount and time." [App. A at 9] Although the Act does not require prepayment disclosures, the foregoing legislative history shows that the term "prepayment" has a well established meaning in the consumer credit industry and denotes a full payment of the contract balance.

Section 226.8(b)(7) in plain and simple terms requires the creditor to disclose its method of computing the rebate of unearned finance charges in the event that a precomputed contract is paid in full prior to the scheduled maturity date.

3. The Contracts in These Cases Fully and Accurately Disclose the Creditor's Method of Rebate of Unearned Finance Charges

Paragraph 14 on the front side of the contracts in these cases contains the following disclosure of the Buyers' right to a rebate of unearned finance charges in the event of a prepayment of the obligation:

> "(14) Prepayment Rebate: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $15.00. No rebate will be made if the amount is less than $1.00." [J.A. 9, 65]

This disclosure complies in all respects with Section 226.8(b)(7) of the Regulation.

B. The Federal Reserve Board Has Issued an Official Staff Interpretation Stating That the Creditor's Method of Rebating Unearned Finance Charges Upon Prepayment of the Indebtedness After Acceleration Need Not Be Separately Disclosed Where It Is the Same as the Disclosed Method of Rebate Applicable to Voluntary Prepayment

In its Staff Letter No. 851 and Official Staff Interpretation No. FC-0054, the Board interpreted Section 226.8(b)(7) of its own Regulation and discussed whether any special prepayment disclosures are required because of the presence of an acceleration clause in a precomputed contract. The Board concluded that no such special disclosures are required.

1. Staff Letter 851

The relevant portion of Staff Letter 851 states that:

> "For the purposes of Truth in Lending disclosures, this staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of § 226.8(b)(7) of the Regulation, which require

the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made, apply. If the creditor rebates under one method for acceleration and another for voluntary prepayment, both methods would need to be identified under § 226.8(b)(7). Failure to disclose the method of rebate or nonrebate would be a violation of the Truth in Lending Act." [App. B at 21]

As pointed out earlier in the context of Section 226.8(b)(4),[27] this letter created some confusion as to what the staff meant by stating that it viewed "acceleration of payments as essentially a prepayment of the contract obligation." One possible interpretation of this letter might suggest that it was the staff's position that, when a creditor accelerates the unpaid installments of a precomputed contract, the contract at that point is deemed to be "prepaid." This interpretation would turn a creditor's demand for payment of unpaid installments into a payment of the installments even though the creditor might never receive another payment on the contract. However, an acceleration of installment payments is not a payment of the unpaid installments but is the first step taken by the creditor in an attempt to secure payment of the installments. Acceleration occurs because the creditor has not been paid and is both the legal and logical antithesis of prepayment.[28]

[27] *See* pages 40-41 *supra.*

[28] *Martin v. Commercial Securities Co., Inc.*, 539 F.2d 521, 529 (5th Cir. 1976) ("In the installment credit context prepayment and acceleration appear to be conceptually antithetical. The former is the unilateral act of the debtor; the latter the unilateral act of the creditor in the typical installment contract."); *Perry v. Liberty Consumer Discount Co.*, 433 F. Supp. 1352, 1359 (E.D. Pa. 1977), *aff'd mem.*, 577 F.2d 728 (3d Cir. 1978) ("As I view it, acceleration is but the first step by the lender in *attempting* to obtain prepayment from the borrower; in no sense can acceleration and prepayment be equated." (emphasis in original)).

The proper interpretation of Staff Letter 851 is that the staff was stating that it viewed *payment* after acceleration as essentially a form of prepayment. The Official Staff Interpretation expressly adopted this view.

2. Official Staff Interpretation No. FC-0054

In order to remove any confusion caused by Staff Letter 851, the Board issued an Official Staff Interpretation in which it stated emphatically that it views a *payment* of the indebtedness after acceleration as a prepayment:

> "You refer to a prior Public Information Letter, No. 851, which discusses the right of acceleration. Staff believes that letter addresses a different issue than the one posed in your letter. *Staff understands that letter to say that early payment of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation.* Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under § 226.8(b)(7) *when the customer pays the balance of the obligation upon acceleration,* any amounts retained beyond those which would have been rebated under the disclosed rebate provisions do represent the type of charge that must be disclosed under § 226.8 (b)(4)." [App. B at 19] (emphasis added).

This Official Staff Interpretation was followed by two additional Staff Letters (nos. 1208 and 1324) repeating

the Board's analysis that a payment of the indebtedness after acceleration is treated as a prepayment for purposes of Section 226.8(b)(7). [App. B at 22-26]

3. Summary of the Board's Position

The Board's position on Section 226.8(b)(7) can thus be summarized as follows:

1. The Board views a *payment* in full of the indebtedness after acceleration as "essentially" the same as a prepayment. The Board does not view an acceleration of the indebtedness as itself a prepayment.

2. Under Section 226.8(b)(7) of the Regulation, the creditor must disclose its method of rebating unearned finance charges upon prepayment of the indebtedness. If the creditor's rebate practice applicable to a prepayment of the indebtedness following acceleration is different from that applicable to voluntary prepayment, both methods of rebate must be disclosed under Section 226.8 (b)(7). However, if the creditor rebates unearned finance charges upon prepayment of the indebtedness after acceleration in the same manner that it rebates unearned finance charges upon voluntary prepayment of the indebtedness where there has been no acceleration, a single disclosure of the rebate method is all that is required. The disclosure need not single out the rebate policy applicable to prepayment after acceleration.

4. The Board's Interpretation of Its Own Regulation Is Plainly Correct and Should Be Followed

The Board's interpretation with respect to prepayment disclosures is plainly correct. The interpretation is consistent with the well-established meaning of the

term prepayment which denotes full payment of the contract balance prior to the originally scheduled maturity date. It is also consistent with the purpose of Section 226.8(b)(7) which is to require the disclosure of the creditor's method of rebating unearned finance charges upon early payment of a precomputed contract. It would be pointless and confusing to require disclosure of whether the creditor rebates unearned finance charges upon acceleration of the contract. This is because there are no unearned finance charges that accrue to the creditor upon acceleration of the contract. It is only when the debtor makes *payment* of the contract balance *after* acceleration and prior to the originally scheduled maturity date that the creditor could receive unearned finance charges. Until that payment is made, all precomputed finance charges continue to be earned by the creditor.

The special rule of deference applicable to the Board's interpretation of its own Regulation has been discussed in part II of the Brief. This rule was particularly well stated by the Ninth Circuit in *Bone v. Hibernia Bank,* 493 F.2d 135, 139 (9th Cir. 1974) which involved an Official Board Interpretation of Section 226.8(b)(7) of the Regulation:

> "Our concern here is not with the construction of a statute, but rather with the construction of an administrative regulation issued pursuant to statutory directive. When interpreting an administrative regulation whose meaning is in doubt, we must necessarily look to the construction given the regulation by the agency responsible for its promulgation. *Bowles v. Seminole Rock Co.,* 325 U.S. 410, 65 S. Ct. 1215, 89 L. Ed. 1700 (1945).

. . . Great deference is especially due the Federal Reserve Board's construction of its own Regulation Z because of the important interpretive and enforcement powers granted this agency by Congress under the Truth in Lending Act."

5. The Disclosure Statements in These Cases Comply With the Board's Interpretation

The disclosure statements employed in these cases disclose fully the creditor's method of rebating unearned finance charges upon prepayment in full of the indebtedness. [J.A. 9, 65] This prepayment disclosure applies to any prepayment of the indebtedness whether it occurs before or after an acceleration. And, in accordance with the disclosure and Oregon state law, Ford Credit rebates unearned finance charges upon prepayment of the indebtedness after acceleration in the same manner that it rebates unearned finance charges upon prepayment of the indebtedness where there has been no acceleration. The disclosure statements in these cases thus comply with Section 226.8 (b)(7) as interpreted by the Board.

C. The Decision of the Lower Court Equating Prepayment With Acceleration Should Be Reversed

The court below held that Ford Credit violated the Act and Regulation Z in the following respect:

"We hold on the basis of *St. Germaine* [*sic*] that Ford Credit is liable to the Milhollins for failure to disclose the acceleration clause and its effect on unearned interest on the face of the contract." *Milhollin v. Ford Motor Credit Co.*, 588 F.2d 753, 758 (9th Cir. 1978). [J.A. 51]

The court did not independently analyze the issue but instead relied completely upon the Ninth Circuit's opinion in *St. Germain v. Bank of Hawaii*, 573 F.2d 572 (9th Cir. 1977).

In *St. Germain*, the plaintiff alleged that the creditor violated the Act and the Regulation by failing to disclose its right to accelerate the indebtedness as a default charge pursuant to Section 226.8(b)(4). The court held that default charge disclosures are never required with respect to an acceleration clause under Section 226.8(b)(4) and rejected the Board's Official Staff Interpretation No. FC-0054. 573 F.2d at 575-77. This rejection was based in part upon the court's mistaken view that the Board's position has been expressed "only through unofficial staff statements rather than official interpretations," 573 F.2d at 576, and in part upon the court's belief that application of the Board's Official Staff Interpretation would result in "the disclosure of rebate confusion" because of the lack of uniformity in state laws concerning finance charge rebates. 573 F. 2d at 575.

Having rejected the Board's Official Staff Interpretation of Section 226.8(b)(4), the court addressed the issue of whether prepayment disclosures are required under Section 226.8(b)(7).[29] The court's holding in this respect is unclear. At the beginning of the opinion the court stated:

"We reverse, holding that TILA compels a creditor making a consumer loan to disclose the creditor's

[29]As in this case, the plaintiff in *St. Germain* had not alleged or argued any violation of Section 226.8(b)(7). This issue was injected into the case by the court on its own and after oral argument.

right to accelerate full payment of the debt upon the debtor's default or late payment." 573 F.2d at 573.

Despite this sweeping language, it is unlikely that the court really intended to hold that the Regulation requires disclosure of the "right to accelerate" because such a holding would necessarily be premised upon the theory that the right to accelerate constitutes a "charge" under Section 226.8(b)(4); and this theory was specifically rejected by the court. 573 F.2d at 576.

At the conclusion of the opinion, the court made it clear that its holding was instead based upon the prepayment disclosure requirements of Section 226.8 (b)(7). The court cited Staff Letter 851 and the Board's Official Staff Interpretation No. FC-0054 and described the Board's theory that a payment after acceleration is considered a prepayment for purposes of Section 226.8(b)(7). 573 F.2d at 576. Although the court stated that it was adopting the Board's prepayment theory, it badly misread the Board's position in this regard and held that prepayment and acceleration are equivalents:

> "When we choose the Board's alternative prepayment theory, we cut a clean path through the thicket. Regulation Z, Section 226.8(b)(7), requires '[i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full. . . . If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact should be disclosed.' When we equate acceleration with prepayment, the disclosure obligation under Section 226.8(b)(7) is evident: The creditor must disclose whether a rebate of unearned interest will be made upon acceleration and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated." 573 F.2d at 577.

As discussed above, the Board's Official Staff Interpretation clearly and emphatically rejects any notion that prepayment and acceleration are the same. The Official Staff Interpretation, in discussing Staff Letter 851, explains that:

> "Staff understands that letter to say that early *payment* of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation." [App. B at 19] (emphasis in original).

The Ninth Circuit in *St. Germain* either overlooked this crucial fact or once again chose to disregard the Official Staff Interpretation, this time in the context of Section 226.8(b)(7).[80]

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[80]Even assuming, for purposes of discussion, the correctness of the court's holding that prepayment and acceleration are the same, the *St. Germain* decision is erroneous. The court in *St. Germain* stated that it could "perceive no serious textual impediment to reading Section 226.8(b)(7) prepayment to include involuntary prepayment (acceleration) as well as voluntary prepayment." 573 F.2d at 576. The disclosure form employed by the bank in *St. Germain* described the bank's rebate policy upon "prepayment." *Id.* at 573. If prepayment and acceleration are the same, the bank's form complied with section 226.8(b)(7) as interpreted by the court since it described the bank's rebate policy upon prepayment. *See Griffith v. Superior Ford*, 577 F.2d 455, 459 (8th Cir. 1978) criticizing *St. Germain* for this reason. *See also Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 269 n.28 (3d Cir. 1975).

The decision in *St. Germain* represented a startling and radical departure from prior law on the subject of acceleration disclosures. It conflicted with the Board's Official Staff Interpretation of both Sections 226.8(b)(4) and 226.8(b)(7) and with the decisions of every other circuit court on the subject. The decision also conflicted with well established law in the Ninth Circuit requiring the courts to accord special deference to the views of the Board and its staff. *E.g.*, *Bone v. Hibernia Bank*, 493 F.2d 135, 140 (9th Cir. 1974).

By equating acceleration with prepayment, a logical and legal impossibility,[31] the court's unprecedented decision took the consumer credit industry completely by surprise and threw into instant violation of the Act literally millions of consumer credit contracts drafted in careful compliance with the Board's interpretive guidelines.

The *St. Germain* decision is illustrative of the problems facing creditors attempting in good faith to draft uniform disclosure statements that will both comply with the highly technical requirements of the Act and the Regulation and be meaningful to consumers. The same Ford Credit form that the court found insufficient in these cases was found to be sufficient by the Third Circuit in *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3rd Cir. 1975) and by the Eighth Circuit in *Griffith v. Superior Ford*, 577 F.2d 455 (8th Cir. 1978). The Federal Reserve Board, through an Official Staff Interpretation, has offered reasonable and logical disclosure guidelines applicable to both Sections 226.8(b)(4) and 226.8(b)(7) of its Regulation. These disclosure guidelines fulfill

[31]*See* page 52 and note 28 *supra*.

an explicit Congressional directive to the Board, 15 U.S.C. § 1640(f) (1976), and offer some modest hope for national uniformity amidst growing chaos in the federal courts.

This Court should reject the holding of the court in *St. Germain* and direct the lower federal courts to follow the clear disclosure guidelines set forth in the Board's Official Staff Interpretation.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX A

LEGISLATIVE HISTORY OF THE TRUTH IN LENDING ACT

1. In General

The Truth in Lending Act was the product of a merger between two separate bills, one introduced in the Senate and the other in the House of Representatives. The original Senate Bill, S. 5, 90th Cong., 1st Sess. (1967) (herein "Senate Bill"), was introduced in the United States Senate on January 11, 1967. 113 Cong. Rec. 210-12 (1967). The Senate Bill was passed in the Senate on July 11, 1967, 113 Cong. Rec. 18424 (1967), and was sent to the House of Representatives for approval. The Senate Bill was accompanied by a Report of the Committee on Banking and Currency dated June 29, 1967, S. Rep. No. 392, 90th Cong., 1st Sess. (1967) (herein "Senate Report").

A bill was thereafter introduced in the House of Representatives, H.R. 11601, 90th Cong., 1st Sess. (1967) (herein "House Bill"), principally sponsored by Congresswoman Sullivan, which differed from the Senate Bill primarily in the area of disclosures in connection with mortgage transactions and open end credit. *See* 114 Cong. Rec. 1852-57, 10963-64 (1968). The House Bill passed in the House of Representatives on February 1, 1968. 114 Cong. Rec. 1852 (1968). The House Bill was accompanied by a Report of the Committee on Banking and Currency dated December 13, 1967, H.R. Rep. No. 1040, 90th Cong., 1st Sess. (1967) (herein "House Report").

The Senate called for a Conference Committee to study the major conflicts in the two Bills, particularly

in the area of exempted transactions. *See* 114 Cong. Rec. 14487 (1968). After six meetings, the Conference Committee resolved the differences between the House Bill and the Senate Bill and reached an agreement on May 14, 1968. 114 Cong. Rec. 14487 (1968). On May 20, 1968, Congressman Wright Patman submitted the formal Conference Report to accompany the Senate Bill. H.R. Conf. Rep. No. 1397, 90th Cong., 2d Sess. (1968) (herein "Conference Report").

On May 22, 1968, the Senate Bill was passed in lieu of the House Bill after adopting for its language much of the text of the House Bill. The Act was signed into law on May 29, 1968, to become effective on July 1, 1969. Pub. L. No. 90-321, § 504(b), 82 Stat. 146.

2. Legislative History Concerning the Credit Cost Disclosure Aspect of the Act

The original Senate Bill was strictly limited to the disclosure of the costs of credit in numerical terms. *See Truth in Lending—1967: Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency,* 90th Cong., 1st Sess. 4-14 (1967). In the Senate Report, Senator Proxmire stated the purpose of the Act as follows:

> "The basic purpose of the truth in lending bill is to provide a full disclosure of *credit charges* to the American consumer. The bill does not in any way regulate the credit industry nor does it prescribe ceilings on credit charges. Instead, it requires that a full disclosure of *credit charges* be made so that the consumer can decide for himself whether the charge is reasonable.

> By providing full and comparable disclosure of information, the bill will permit consumers to compare the *cost of credit* among different creditors and to shop effectively for the best credit buy. The committee also believes the bill will promote the wiser use of consumer credit by consumers when they know the full *cost of credit.*" Senate Report at 1 (emphasis added).

In that same Report, Senator Proxmire defined the term "cost of credit" exclusively in terms of numerical figures—dollars and cents and percentages:

> "In this way, the honest merchant is not penalized if he states the full *cost of his credit in dollars* and adds an annual percentage rate.
>
> . . . .
>
> . . . Clearly, the only solution is to require by legislation that all creditors use the same method in computing and quoting finance charges including the statement of an annual percentage rate.
>
> . . . .
>
> All installment creditors would be required to *disclose the total cost of the credit in terms of dollars and cents* and in terms of an annual percentage rate. In addition, all other charges incident to the transaction will be required to be set forth such as taxes, official fees, or insurance." Senate Report at 2, 3, 7 (emphasis added).

This conception of the cost of credit and the purpose of the Act is supported by the discussion relating to the Act in the Senate. *See* 113 Cong. Rec. 18399-424 (1967). For example, Senator Williams of Delaware emphasized that the basic purpose of the bill was to advise the debtor of a specific figure—the rate of interest he will have to pay:

"The basic purpose of the bill, as we all understand it, is to insure to the borrower that he will be told the truth by the lender as to the rate of interest he will have to pay over the term of the borrowing. That is the basic objective in the bill, as we all admit." 113 Cong. Rec. 18415 (1967).

Senator Dodd urged that the bill be passed because it required the disclosure of figures:

"Surely they have a right to know in reasonably clear and simple language and figures, exactly *how much in the way of interest and service charges* they pay on any loan or charge agreement.

Exactly how interest is computed, what it is as an actual percentage or as a *statement in terms of dollars and cents,* what the service charges are—all this information vital to the consumer, should be easily available to him so that he may make a rational decision." 113 Cong. Rec. 18418 (1967) (emphasis added).

Senator Brewster explained that this kind of disclosure would permit consumers to shop for credit:

"Consumers need a basis for comparing credit arrangements, and such comparisons can be made when *charges are stated in terms of annual percentage rate, a figure which includes all credit costs*—examination fees, insurance charges, and any other fees." 113 Cong. Rec. 18418 (1967) (emphasis added).

Finally, Senator Yarborough urged that the bill would permit consumer decisions to be based upon simple figures:

"Under the provisions of the truth-in-lending bill, instead of being faced with the combination of monthly interest rates on the total principal graduated rates of various parts of the loan, add-on rates, and unexpected service charges, the consumers in most credit dealings would be given a percent-per-year figure computed in the approved actuarial method. Using these simple figures, the consumer could then compare the interest rates of various companies and rationally chose [*sic*] the one with which he would do business." 113 Cong. Rec. 18419 (1967).

The House Bill, like the Senate Bill, was entirely cost oriented. The House Report stated its purpose as follows:

"As set forth in its three substantive titles, the Consumer Credit Protection Act has three fundamental purposes: Title I is intended to provide the American consumer with truth-in-lending and truth-in-credit advertising by providing full disclosure of the *terms and conditions of finance charges* both in credit transactions and in offers to extend credit. . . .

Title I, the truth in lending and credit advertising title, neither regulates the credit industry, nor does it impose ceilings on credit charges. *It provides for full disclosure of credit charges, rather than regulation of the terms and conditions under which credit may be extended.* It is the view of your committee that such full disclosure would aid the consumer in deciding for himself the reasonableness of the credit charges imposed and further permit the consumer to 'comparison shop' for credit. It is your committee's view that full

> disclosure of the terms and conditions of credit charges will encourage a wiser and more judicious use of consumer credit." House Report at 6-7 (emphasis added).

3. Legislative History Concerning Default, Delinquency or Similar Charges

There is very little legislative history concerning Section 128(a)(9) of the Act, 15 U.S.C. § 1638(a)(9), requiring the disclosure of "default, delinquency or similar charges payable in the event of late payments."

The final drafts of both the Senate Bill and the House Bill required the disclosure of default, delinquency or similar charges. Although the House Report did not specifically discuss the meaning of these terms, the Report deals with other types of "charges" and equates them with fees or numeric costs. For example, in discussing the sums of money that must be included in the computation of the amount of the finance charge, the House Report discusses "charges" as follows:

> "Other creditors add a number of additional fees or charges to the basic finance charge, such as credit investigation fees, credit life insurance, and various 'service' charges. This permits a creditor to quote a low rate while actually earning a higher yield through the additional fees and charges." House Report at 13.

The House Report also states that the Act would require that "all additional mandatory charges imposed by the creditor as an incident to credit be included in the computation of the applicable percentage rate. . . ." *Id.* at 13. And, in discussing the monetary amounts that need not be included in the determination

of the dollar amount of the finance charge, the Report states:

> "Section 203(b) requires disclosure of the cash price, the downpayment (including any trade-in), the difference between the two, *and all other charges that are included in the credit but are not part of the finance charge*. . . . The number, amount, and due dates of the payments must also be disclosed, as well as any penalties for late payments." *Id.* at 25 (emphasis added).

The first draft of the Senate Bill did not mention "default, delinquency or similar charges." Senator Proxmire's original bill called for the disclosure of:

> "(8) the time and amount of payments scheduled to repay the indebtedness; and
>
> (9) the terms applicable in the event of advanced or delayed payments from those specified in (8) above." 113 Cong. Rec. 14691 (1967).

When Senator Proxmire introduced the Senate Bill, the commentary on the above-quoted section stated it was intended to require the disclosure of:

> "the time and amount of payments scheduled to repay the indebtedness and the terms (*penalties*) applicable in event of payments advanced or delayed from those specified in the contract. (Disclosures of the time and amount of payments, and of the *penalties* for early or late payment, were not explicitly covered by earlier bills.)" 113 Cong. Rec. at 2049 (1967) (emphasis added).

The use of the term "penalties" in this commentary indicates an intention to require the disclosure of monetary sums payable in the event of delayed payments. This is confirmed by the change made in the final

version of the Senate Bill which dropped the required disclosure of the "terms applicable" to delayed payments and required instead the disclosure of "default, delinquency or similar charges payable in the event of late payments."

4. Legislative History With Respect to Prepayment.

The Truth in Lending Act does not require any disclosures with respect to the prepayment of a credit contract. There is, however, legislative history to indicate that Congress gave to the term "prepayment" its commercially accepted meaning as a payment of the indebtedness prior to the originally scheduled maturity date.

As noted in part 3 of this Appendix, an early version of the Senate Bill required the disclosure of "the terms applicable in the event of advanced . . . payments. . . ." 113 Cong. Rec. 14691 (1967). However, this disclosure requirement was dropped in the final version of the Senate Bill. The Senate Report commented upon this deletion:

> "Section 4(b)(9)—Disclosure of late payment penalties.—This language is similar to the original S. 5 except that the requirement to indicate the terms applicable in the event of advanced payment has been deleted. Most creditors will rebate an unearned finance charge if the debt is paid early in accordance with the 'rule of 78's.' This is a complicated formula which would require at least a three-paragraph explanation to be intelligible to the average consumer." Senate Report at 15.

The House Bill and House Report did not refer to prepayment. However, the Conference Report pre-

pared concerning the compromise reached on the Senate Bill and the House Bill discussed prepayment as follows:

> *"PREPAYMENTS*
>
> The conferees were agreed that the Federal Reserve Board and other regulatory agencies should provide for the disclosure to the obligor at the time of the completion of a consumer credit transaction of any prepayment penalties in connection with real estate mortgages or the policy to be followed by the creditor in granting partial refund, if any, of the finance charges in case of substantial prepayment of an installment contract in terms of amount and time." Conference Report at 25-26.

Implementing this Congressional directive, the Federal Reserve Board adopted Sections 226.8(b)(6) and 226.8(b)(7) as part of Regulation Z. 12 C.F.R. §§ 226.8(b)(6)-(7) (1978). Those sections provide:

> "(b) *Disclosures in sale and nonsale credit.* In any transaction subject to this section, the following items, as applicable, shall be disclosed: . . . .
>
> (6) A description of any penalty charge that may be imposed by the creditor or his assignee for prepayment of the principal of the obligation (such as a real estate mortgage) with an explanation of the method of computation of such penalty and the conditions under which it may be imposed.
>
> (7) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges and a statement of the amount or method of computa-

tion of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer. If the credit contract does not provide for any rebate of unearned finance charges upon prepayment in full, this fact shall be disclosed."

5. Legislative History With Respect to Deference to Be Accorded to the Authority of the Federal Reserve Board

Section 105 of the Act, 15 U.S.C. § 1604 (1976), confers upon the Federal Reserve Board broad power to issue Regulations to implement the disclosure requirements of the Act:

> "The Board shall prescribe regulations to carry out the purposes of this subchapter. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of this subchapter, to prevent circumvention or evasion thereof, or to facilitate compliance therewith."

The legislative history of the Act firmly establishes the central role that Congress intended the Board to occupy in interpreting and administering the Act. The House Report states:

> "All substantive regulations in connection with the full disclosure of the terms and conditions of finance charges in credit transactions or in the advertisement of credit transactions shall be issued by the Board of Governors of the Federal

> Reserve System. No one can deny their experience and expertise in these matters. Accordingly, it is the view of your committee that, for uniformity of application to all affected segments of the industries concerned, a single set of comprehensive regulations should be issued.
>
> . . . .
>
> . . . The Board of Governors of the Federal Reserve System is to be the central single agency for issuing all regulations on credit disclosure or on the advertising of credit to insure a single set of overall standards applicable for all forms of consumer credit, while agencies already having expertise in the affected industries will be responsible for the application of such regulations to each of those industries." House Report at 18-19.

The Senate Report also underscores the Congressional desire that the Board have and exercise substantial administrative power to interpret the Act. Senate Report at 19-20.

After the Act was passed, the Board began work on the preparation of a comprehensive Regulation to implement the disclosure requirements of the Act. A draft of its Regulation was published in the Federal Register on October 18, 1968, and comments were solicited and reviewed. 33 Fed. Reg. 15506 (1968). The final version of the Regulation was published in the Federal Register on February 11, 1969 to be effective on July 1, 1969. 34 Fed. Reg. 2002-11 (1969) (codified in 12 C.F.R. § 226).

Because of the technical nature of both the Act and the Regulation, questions necessarily arose as to the proper interpretation of their various provisions.

The Board responded to these questions through both official and unofficial Board and staff pronouncements. Creditors relied upon these Board interpretations in drafting their disclosure forms. Despite the Board's broad powers under Act, *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), and its recognized expertise, many courts declined to follow these Board interpretations and assumed a *de novo* review function with respect to the disclosure requirements of the Act and Regulation. Creditors whose forms had been drafted in careful compliance with the Board's interpretation of its own Regulation were held to have violated the Act because of new disclosure rules divined by these courts.

As a result, the Federal Reserve Board in its Annual Report to Congress for the year 1973 set forth the legislative recommendations of the National Commission on Consumer Finance. In recommending that the Act be amended to provide a defense for creditors whose forms have been drafted in conformity with Board interpretations, the Commission gave the following explanation:

> "One of the legitimate concerns of creditors who have attempted to comply in good faith with the requirements of Truth in Lending is that, although they have followed Regulation Z, a court may conclude that the Regulation is invalid and that different disclosures or procedures were mandated by the Truth in Lending Act itself. At present, the civil liability provisions of Section 130 do not necessarily preclude a finding of liability where the creditor has followed regulatory requirements which subsequently are held invalid. In order to avoid this specific inequity, a limited

> 'good faith reliance' provision was suggested for inclusion in the Act. It should be noted that the 'good faith *reliance*' proposal suggested by the Board and the Commission does not protect a creditor if he merely makes a simple good faith attempt at '*compliance*.' The Board proposal is as follows:
>
> § 130(f) 'No provision of this section or section 112 imposing any liability shall apply, to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.' (§ 206 of S. 2101)." 1973 Fed. Res. Bd. Ann. Rep. 22-23 (emphasis in original).

Congress responded by adding section 130(f) to the Act in 1974, using the precise language recommended by the Board and the Commission. Act of October 28, 1974, Pub. L. No. 93-495, § 406, 88 Stat. 1518. This new Section of the Act was made expressly retroactive:

> "The amendments made by sections 406 [adding § 130(f)], 407 and 408 shall apply . . . unless prior to the date of enactment of this Act such liability has been determined by final judgment of a court of competent jurisdiction and no further review of such judgment may be had by appeal or otherwise." Act of October 28, 1974, Pub. L. No. 93-495, § 408(3), 88 Stat. 1519.

The Report of the Senate Committee on Banking, Housing and Urban Affairs explained this new section as follows:

"The Truth in Lending Act is highly technical and the Committee does not believe a creditor should be forced to choose between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act. Accordingly, the Committee recommends an amendment to Truth in Lending requested by the Board which would relieve a creditor of any civil liability under Truth in Lending for any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board. In order to confer immunity from civil liability, the rule, regulation, or interpretation thereof must be approved by the Board itself and not merely by the staff of the Board. This amendment is contained under section 206 of Title II.

The Committee is also mindful of the uncertainty of many creditors as to whether their particular disclosure form and related procedures are in compliance with Truth in Lending and the Board's regulations. The Committee expects the Board to use its new authority under Section 206 to reduce the burden of complying with Truth in Lending. One method for accomplishing this objective would be for the Board to publish standard disclosure forms, which if adhered to, would be deemed by the Board to be in compliance with the Truth in Lending Act and the Board's regulations. In addition to removing many uncertainties and preventing hyper-technical litigation, this approach has the added advantage of encouraging standardized disclosure formats, thereby enabling consumers to become more aware of the information

disclosed." S. Rep. No. 93-278, 93rd Cong., 1st Sess. 13-14 (1973).*

In 1976, Section 130(f) was amended so that its protections would apply to interpretations by the authorized staff of the Federal Reserve Board as well as the Board itself. The section now provides:

> "(f) No provision of this section or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by any official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason." 15 U.S.C. § 1640(f) (1976).

This 1976 amendment to Section 130(f) of the Act resulted from an amendment to S.2672, the State Taxation of Depositories Act, made on the floor of the House of Representatives. The language of the amendment was originally contained in H.R. 10561, sponsored by Representative Frank Annunzio. In introducing H.R.

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*Senate Report No. 93-278 related to S.2101 which would have adopted the good faith defense of Section 130(f). S.2101 was passed by the Senate, but was not acted upon by the House of Representatives. Titles I and II of S.2101 containing the good faith defense provisions were later offered as amendments to H.R. 11221, and the amended bill was adopted by Congress on October 28, 1974 as Public Law 93-495. 88 Stat. 1500.

10561, Representative Annunzio outlined its purposes as follows:

"This act also addresses itself to the important problem of compliance with the Truth in Lending Act. Creditors are often hit with costly lawsuits for unintentional technical violations because, even though they attempt to comply, the laws and regulations are too complicated and ambiguous. An amendment to section 130f, the Good Faith Compliance with the Truth in Lending Act, I believe, will help resolve these problems.

Section 130f exempts from liability under truth in lending creditors who are acting in good faith in conformity with any rule, regulation, or interpretation by the Federal Reserve Board. The amendment adds to the exemption any interpretation or approval by an official or employee of the Board authorized by the Board to issue such interpretation or approval under such procedures as the Board may prescribe.

With formal advisory opinions, creditors will at last have a reliable way to know how to comply with truth in lending. Consumers should benefit because creditors will no longer be able to explain away violations by claiming they could not find out how to comply. Consumers, creditors, and the Board should find they are involved in less litigation." 121 Cong. Rec. 36927 (1975).

Senator Garn accepted these House amendments to S.2672 stating:

"A most needed House amendment . . . which I fully support revises section 130(f) of the Truth in Lending Act to authorize the Federal Reserve Board to delegate to an official or employee of

the Federal Reserve System the power to issue binding interpretations of the Truth in Lending Act. Under the current section 130(f) a creditor is exempted from liability under truth in lending when he acts in good faith in conformity with any rule, regulations, or interpretation by the Federal Reserve Board. This amendment will encourage the Board to aid those acting in good faith to comply with the law. It is particularly needed in the case of small businesses that do not have expensive legal talent to aid them in conforming with this complex law." 122 Cong. Rec. 2836 (1976).

Senator Proxmire also urged acceptance of the House amendments:

"In addition the House amendment would authorize the Federal Reserve Board to delegate to its staff the authority to issue interpretations or approvals that would have binding effect in subsequent litigation over violations of the Truth in Lending Act. That is, compliance with such an interpretation would constitute an absolute defense to a creditor until that interpretation was reversed by higher authority.

. . . .

The Senate in turn would be accepting the House provision concerning the delegation to Federal Reserve Board staff of the authority to issue binding interpretations of the law and regulations." 122 Cong. Rec. 2837 (1976).

The Senate concurred in the House amendments to S.2672 as urged by Senators Garn and Proxmire, and the bill was signed by the President on February 27, 1976. 122 Cong. Rec. D. 234 (daily ed. Feb. 27, 1976).

APPENDIX B

OFFICIAL STAFF INTERPRETATION AND STAFF LETTERS OF THE FEDERAL RESERVE BOARD

1. Official Staff Interpretation No. FC-0054, 42 F.R. 18056, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,552 (Excerpts Dealing With Late Payment Charges) (emphasis in original)
April 4, 1977

This is in reply to your letter . . . requesting official staff interpretations of the requirements of Regulation Z with regard to computation of finance charge, disclosure of late payment charges, disclosure of loan proceeds, and the meaning of the term "meaningful sequence." This letter is an official staff interpretation of these four matters.

Staff considers the three other questions raised in your letter as inappropriate for official staff interpretations at this time. An official interpretation concerning disclosure of a dealer's reserve is deemed inappropriate because the Board has proposed for comment an amendment and an interpretation of Regulation Z on this same subject. Similarly, an official interpretation concerning whether loan proceeds must be disclosed is deemed inappropriate because this question has been raised in *Pollock v. General Finance Corporation,* a case currently pending in the United States Court of Appeals for the Fifth Circuit in which the Board filed a brief *amicus curiae.* An official interpretation of your question regarding disclosure of notary fees under § 226.8(d)(3) would be inappropriate since staff's position is not one upon which a creditor may wish to rely in a civil action. A response to that issue will, therefore, be provided in a separate unofficial staff letter to you.

To answer your remaining four questions:

(1) You ask whether a creditor's *right* of acceleration upon default by the obligor must be disclosed as a default, delinquency, or late payment charge within the context of § 226.8(b)(4). It is staff's opinion that the phrase "default, delinquency, or similar charges in the event of late payments," found in § 128(a)(9) and § 129(a)(7) of the Truth in Lending Act and § 226.8(b)(4) of Regulation Z, refers to specific sums assessed against a borrower solely because of failure to make payments when due. It is staff's opinion that the mere right to accelerate contained in a contractual provision which sets out the creditor's right to accelerate the entire obligation upon a certain event (generally the obligor's failure to make a payment when due) is not a *charge* payable in the event of late payment. Therefore, it need not be disclosed under § 226.8(b)(4).

You refer to a prior Public Information Letter, No. 851, which discusses the right of acceleration. Staff believes that letter addresses a different issue than the one posed in your letter. Staff understands that letter to say that early *payment* of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation. Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under § 226.8(b)(7) when the customer pays the balance of the obligation upon acceleration, any amounts retained beyond those which would have been rebated under the disclosed rebate provisions do represent the type of charge that must be disclosed under § 226.8 (b)(4).

(2) You ask a further question regarding what charges must be disclosed as default, delinquency, or late payment charges within the context of § 226.8(b)(4). Specifically, you ask whether attorney's fees and foreclosure costs assessed on a non-automatic basis at the sole discretion of the creditor need to be disclosed pursuant to that section. It is staff's opinion that, if the imposition of these charges is automatic (for example, if the charge becomes immediately due and collectible by virtue of default), the charges must be disclosed under § 226.8(b)(4). If, however, the imposition of the charge is not automatic but is conditioned upon employment of the services of an attorney to effect collection or expenditure of amounts in conjunction with foreclosure proceedings, such charge need not be disclosed under § 226.8(b)(4).

. . . .

This letter is an official staff interpretation of Regulation Z, issued in accordance with § 226.1(d)(3) of the regulation, and limited in its application to the facts and issues presented herein. I trust it will be of assistance to you.

Jerauld C. Kluckman
Associate Director

2. Staff Letter No. 851, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,173 (emphasis in original)

October 22, 1974

This is in response to your letter of June 26, inquiring whether an acceleration clause in an instalment contract is a "charge" payable in the event of late payment within the meaning of § 226.8(b)(4) of Regulation

Z and therefore must be disclosed with other required items.

For the purposes of Truth in Lending disclosures, this staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of § 226.8(b)(7) of the Regulation, which require the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made, apply. If the creditor rebates under one method for acceleration and another for voluntary prepayment, both methods would need to be identified under § 226.8(b)(7). Failure to disclose the method of rebate or nonrebate would be a violation of the Truth in Lending Act.

If, under the acceleration provision, a rebate is made by the creditor in accordance with the disclosure of the rebate provisions of § 226.8(b)(7), we believe that there is no *additional* "charge" for late payments made by the customer and therefore no need to disclose under the provisions of § 226.8(b)(4). On the other hand, if upon acceleration of the unpaid remainder of the total of payments, the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed in § 226.8(b)(7), any amounts retained beyond those which would have been rebated under the disclosed provisions represent a "charge" which should be disclosed under § 226.8(b)(4).

Frederic Solomon
Director

3. Staff Letter No. 1208, [1974-1977 Transfer Binder] Cons. Cred. Guide (CCH) ¶ 31,647 (emphasis in original)

July 6, 1977

This is in reply to your letter . . . requesting clarification of Official Staff Interpretation FC-0054, which discussed the right of acceleration.

In FC-0054, staff took the position that a creditor's right of acceleration upon default by the obligor need not be disclosed as a default, delinquency, or late payment charge within the context of § 226.8(b)(4). The interpretation went on to state, however, that since early payment of the balance of an obligation upon acceleration is essentially the same as voluntary prepayment, if the creditor does not rebate unearned finance charges in the former situation in accordance with the rebate provisions disclosed under § 226.8 (b)(7), any extra amounts retained represent the type of charge that must be disclosed under § 226.8(b)(4).

You state that frequently a disclosure statement will include a provision concerning rebate of unearned finance charges upon prepayment, but contains no referece [*sic*] to the right of acceleration in the event of default. The promissory note to which the statement relates, however, often does contain an acceleration clause stating that "the entire then remaining unpaid balance hereof shall . . . be immediately due and payable . . . ," making no reference to any rebate in the event of payment after acceleration. You state that some creditors have a policy of providing rebates upon early payment after acceleration, while others do not. You suggest that where the contract is silent concerning rebate upon prepayment after acceleration, it must be assumed that such a rebate is *not* provided,

and, therefore, the disclosure statement must make the § 226.8(b)(4) disclosure discussed above.

Staff does not agree with your analysis of this situation. The fact that the contract is silent concerning rebate upon prepayment after acceleration is not determinative of the issue; the question is whether in fact the creditor does or does not rebate upon prepayment after acceleration in accordance with the rebate method shown on the disclosure statement. In this sense, then, the individual creditor's policy determines whether there is a violation of the Act and regulation.

This is an unofficial staff interpretation of Regulation Z. Although you requested issuance of an official staff interpretation, we believe that to be inappropriate in these circumstances since your question does not appear to staff to involve a technical ambiguity in the regulation.

Jerauld C. Kluckman
Associate Director

4. Staff Letter No. 1324, Cons. Cred. Guide (CCH) ¶ 31,827

November 14, 1978

This is in response to your letter . . . in which you request an interpretation of § 226.8(b)(4) of Regulation Z, which requires disclosure of the amount or method of computing the amount of any default, delinquency, or similar charges which may be imposed in connection with a credit transaction.

Specifically, you ask whether a disclosure is required under § 226.8(b)(4) where a credit agreement gives the creditor the right, upon the customer's default, to accelerate payment of the entire indebtedness, includ-

ing unearned finance charges, but State law requires a rebate of unearned finance charges in such circumstances.

Your question is answered in part by reference to Official Staff Interpretation FC-0054 and Public Information Letter 1208, copies of which are enclosed. The staff's position, as expressed in those interpretations, is that if a creditor rebates unearned finance charges in connection with prepayment upon acceleration using the same method as for voluntary prepayment and that method has been properly disclosed in accordance with § 226.8(b)(7), there is no default charge. However, any amounts retained by a creditor upon acceleration which would have been rebated under the disclosed rebate provisions would represent the type of default charge which must be disclosed pursuant to § 226.8(b)(4).

Applying the foregoing to the situation you pose, the staff believes that if a creditor in fact rebates unearned finance charges in connection with prepayment upon acceleration in accordance with State law and, as a result, the customer receives the same rebate as would be received under the disclosed rebate method, then prepayment upon acceleration would not involve any default charge.

Conversely, any unearned finance charges retained by a creditor in connection with prepayment upon acceleration, which would not be retained under the disclosed rebate calculation method, would constitute a default charge which must be disclosed under § 226.8(b)(4). This is so whether the excess charges are retained pursuant to the creditor's apparent contract right or because the rebate method prescribed by State

law results in a lesser rebate than the method disclosed.

There is an additional consideration which the staff would also call to your attention. Even where a creditor's policy is to rebate unearned finance charges in the event of prepayment upon acceleration in accordance with State law, so that no charges are retained in excess of those indicated by the disclosed rebate method, a statement in the underlying contract which apparently gives the creditor the right to retain such unearned finance charges may mislead a customer into believing that there will be no rebate upon acceleration. Such a contractual provision, if supplied to a customer with rebate method disclosure required by § 226.8(b)(7) (e.g., as part of a combined note and disclosure form or where separate note and disclosure forms are presented to the customer simultaneously), would constitute additional information within the meaning of § 226.6(c) of Regulation Z. If this additional information is misleading or confusing or contradicts, obscures, or detracts attention from the required § 226.8(b)(7) disclosure, there would be a violation of the regulation. Of course, the capacity of the additional information to mislead or confuse can only be determined by reference to all of the circumstances of a particular case.

You note that the question of disclosure of the right of acceleration has been the subject of litigation in various jurisdictions. The views expressed in this letter and the enclosed interpretations represent the staff's opinion on this issue. However, it would be advisable for creditors to be aware of court holdings in their particular jurisdiction (some of which may be contrary to the staff's position) so that they may

determine the most prudent course to follow. The particular case which you cite, *McDaniel v. Fulton National Bank of Atlanta,* 571 F.2d 948 (5th Cir. 1978), however, would appear to be consistent with the staff's views. In fact, the court in that case relied in part upon FC-0054 in reaching its decision.

This is an unofficial staff interpretation of Regulation Z, limited in its applicability to the facts and issues discussed above. If you desire further assistance, please contact this office or Mr. Richard A. Dill, Assistant Vice President, Department of Supervision and Regulation, Federal Reserve Bank of Atlanta, Atlanta, Georgia 30303.

Glenn E. Loney
Section Chief

Service of the within and receipt of a copy thereof is hereby admitted this .... day of August, A.D. 1979.